RECEIVED by MSC 9/14/2021 5:00:33 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

RENEE PINSKY and DAVID PINSKY,

Plaintiffs/Appellants,

vs.

THE KROGER CO. OF MICHIGAN, a Michigan corporation,

Defendant/Appellee.

_____/

Supreme Court No. 163430
Court of Appeals 351025

Washtenaw County Circuit Court
Case No. 19-000208-NO
Hon. Timothy P. Connors

MALIN & KUTINSKY
BRIAN A. KUTINSKY (P39107)
Attorneys for Plaintiffs/Appellants
30777 Northwestern Hwy, Ste 300
Farmington Hills, MI 48334
(248) 973-1000
(248) 254-3210 [Fax]
Bkutinsky@themklawfirm.com

LANDRY, MAZZEO & DEMBINSKI, PC
NANCY VAYDA DEMBINSKI (P54144)
Attorneys for Defendant/Appellee Kroger
37000 Grand River Avenue, Suite 200
Farmington Hills, MI 48335
(248) 476-6900
(248) 476-6564 [Fax]
ndembinski@lmdlaw.com

STEVEN A. HICKS (P49966)
Co-Counsel for Plaintiffs/Appellants
216 North Chestnut Street
Lansing, MI 48933
(517) 881-5564
steve@chair2consulting.com

_____/

Defendant-Appellee The Kroger Co. of Michigan's Answer in Opposition to Plaintiffs-Appellants' Application for Leave to Appeal

RECEIVED by MSC 9/14/2021 5:00:33 PM

TABLE OF CONTENTS

TABLE OF CONTENTS ii
INDEX OF AUTHORITIES iv
COUNTER-STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED vi
COUNTER-STATEMENT OF QUESTIONS PRESENTED viii
INTRODUCTION 1
COUNTER-STATEMENT OF FACTS 4
A. Material facts. 4
B. Material proceedings. 8
i. The Circuit Court denies Kroger's motion for summary disposition under MCR 2.116(C)(10). 8
ii. The Court of Appeals reverses the Circuit Court and remands for entry of an order granting summary disposition in Kroger's favor 10
STANDARD OF REVIEW 11
ARGUMENT 12
I. Leave to Appeal should be denied because the open and obvious danger doctrine precludes liability - there is no genuine issue of material fact that, as a matter of law, an average person with ordinary intelligence would have discovered the alleged hazard (the white cable closing the checkout lane) upon casual inspection, and the danger of tripping and falling on the ground is not unreasonably dangerous. 12
II. The facts of this case do not involve a distracted customer, nor was distraction argued in the trial court. This Court should deny leave to appeal of an unpreserved question regarding whether a premises owner should anticipate that harm may result to its customer, even though the condition is open and obvious, if it is foreseeable that its customer will be distracted. 23
III. Leave to appeal should be denied because decades of Michigan law makes clear that the open and obvious danger doctrine attacks the duty element of a premises liability case; that it is an integral part of the definition of the duty owed by a premises owner to an invitee; and that whether a condition is open and obvious is a question of law to decide by employing an objective standard that does not involve weighing the comparative fault of the parties. The duty element and the comparative negligence standard are fundamentally exclusive; they are two doctrines to be utilized at different junctures in the determination of liability. 29

RELIEF 32

RECEIVED by MSC 9/14/2021 5:00:33 PM

RECEIVED by MSC 9/14/2021 5:00:33 PM

INDEX OF AUTHORITIES

Cases

Antcliff v State Employees Credit Union, 414 Mich 624 (1982) 31
Bertrand v Alan Ford Inc, 449 Mich 606 (1995) ..... passim
Brooks v Bruce Campbell Dodge, Inc, unpublished per curiam opinion of the Michigan Court of Appeals issued Sept. 23, 2010 (Docket No. 293039) 16
Buhalis v Trinity Continuing Care Servs, 296 Mich App 685 (2012) 14, 26, 30, 32
Bullard v Oakwood Annapolis Hospital, 308 Mich App 403 (2014) 21
Charleston v Meijer, Inc, 124 Mich App 416 (1983) 27
Corey v Davenport College of Business (On Remand), 251 Mich App 1 (2002) 10, 22
Foster v Costco Wholesale Corp, 291 P3d 150 (2012) 30
Hoffner v Lanctoe, 492 Mich 450 (2012) 14, 21, 28
Horne v Precision Cars of Lexington, Inc, 170 SW3d 364 (2005) 30
James v Alberts, 464 Mich 12 (2001) 14
Joyce v Rubin, 249 Mich App 231 (2002) 20
Kachudas v Invaders Self Auto Wash Inc, 486 Mich 913 (2010) 14
Kennedy v Great Atlantic & Pacific Tea Co, 274 Mich App 710 (2007) ..... passim
Kenney v Kaatz Funeral Home Inc, 264 Mich App 99 (2004) (Griffin, J., dissenting), adopted 472 Mich 929 (2005) 14
Kentucky River Med Center v McIntosh, 319 SW3d 385 (2010) 30
Livings v Sage's Investment Group, LLC, ___ Mich ___, docket 159692 (6/30/21); 2021 Mich LEXIS 1114 (2021) 3, 28, 30
Livings v Sage's Investment Group, LLC, 505 Mich 985 (2020) 28
Lugo v Ameritech Corp Inc, 464 Mich 512 (2001) ..... passim
Maiden v Rozwood, 461 Mich 109 (1999) 11, 12
Millikin v Walton Manor Mobile Home Park Inc, 234 Mich App 490 (1999) 13, 14
Novotney v Burger King Corp (On Remand), 198 Mich App 470 (1993) 14, 19, 26
Pena v Ingham County Road Commission, 255 Mich App 299 (2003) 12
Quinto v Cross & Peters Co, 451 Mich 358 (1996) 12
Riddle v McLouth Steel Products Corp, 445 Mich 85 (1992) ..... passim
Smith v Allendale Mut Ins Co, 410 Mich 685 (1981) 31
Steigman v Outrigger Enterprises Inc, 267 P3d 1238 (2011) 30
West v General Motors Corp, 469 Mich 177 (2003) 12

Other Authorities

Prosser & Keeton, Torts (5th ed), ch 5 31
Restatement Torts, 2d § 343 ..... 24, 28
Restatement Torts, 2d 343A 24, 28
Restatement Torts, 3d 30

Rules

MCR 2.116(C)(10) ..... vi, 1, 8, 12

MCR 2.116(G)(4) 12
MCR 7.215(C)(1)..... 16
MCR 7.303(B)(2)..... vii

RECEIVED by MSC 9/14/2021 5:00:33 PM

RECEIVED by MSC 9/14/2021 5:00:33 PM

COUNTER-STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED

In this premises liability case involving a trip and fall at a Kroger store by customer, Plaintiff-Appellant Renee Pinsky, Defendant The Kroger Co. of Michigan moved for summary disposition under MCR 2.116(C)(10), arguing there were no genuine issues of material fact that: (1) the case sounded in premises liability and not general negligence, (2) the white cable over which Plaintiff Renee Pinsky tripped was open and obvious to an average person of ordinary intelligence on casual inspection, and (3) the white cable did not constitute a special aspect as it did not create an unusually high risk of severe injury and was avoidable. (Complaint; Kroger's motion for summary disposition; Apx Exh 3-trial court register of actions 2/26/2019 and 8/15/2019).[1] On September 26, 2019, the trial court entered an order denying Kroger's motion, finding genuine issues of material fact existed regarding whether the condition was open and obvious and whether it was unreasonably dangerous. (Apx Exh 4-Order; Apx Exh 5-MSD transcript).

On October 10, 2019, Kroger timely sought an Application for Leave to Appeal in the Court of Appeals, which was granted February 11, 2020. On May 27, 2021, the Court of Appeals issued a unanimous unpublished opinion reversing the trial court and remanding for entry of an order granting Kroger summary disposition. (Apx Exh 1-COA Opinion). On July 6, 2021, the Court of Appeals issued an Order denying

[1] References to "Apx Exh" concern the Appellants' Appendix with List of Exhibits filed with their Application for Leave to Appeal with this Court.

Plaintiffs' motion for reconsideration. (Apx Exh 2-COA Order).

On August 17, 2021, Plaintiffs filed a timely application for leave to appeal with this Court. This Court has discretion to exercise its jurisdiction under MCR 7.303(B)(2). But where the issues in the case were fully resolved on a straightforward application of premises liability case law to the record evidence, Kroger urges this Court to deny leave to appeal.

RECEIVED by MSC 9/14/2021 5:00:33 PM

RECEIVED by MSC 9/14/2021 5:00:33 PM

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. To close a checkout lane to customers, a Kroger store manager strung a white cable across the width of the checkout lane's entrance and through a two-tier basket standing in the middle of the lane. Customer Renee Pinsky noticed the two-tier basket in the middle of the closed checkout lane but could not explain why she did not also notice the white cable stretching from both sides of it, even though there was nothing obscuring it from her view. She tripped on it, falling to the ground. The Court of Appeals applied binding premises liability case law to the facts in a light most favorable to the Plaintiffs and, in an unpublished opinion, unanimously held that the condition was open and obvious and was not unreasonably dangerous because it did not pose a substantial risk of death or severe injury. Should this Court grant leave to appeal to undertake further consideration of these issues in this case?

Plaintiffs/Appellants say: Yes

Defendant/Appellee says: No

RECEIVED by MSC 9/14/2021 5:00:33 PM

II. Renee Pinsky did not testify that she was distracted at the time of her fall, nor did Plaintiffs argue that Renee Pinsky was distracted in their response or oral arguments in opposition to Kroger's motion for summary disposition in the trial court. Should this Court grant leave to appeal to consider an unpreserved question of whether a premises owner should anticipate that harm may result to its customer, even though the condition is open and obvious, if it is foreseeable that its customer will be distracted?

Plaintiffs/Appellants say: Yes

Defendant/Appellee says: No

III. Decades of Michigan law makes clear that the open and obvious danger doctrine attacks the duty element of a premises liability case; that it is an integral part of the definition of the duty owed by a premises owner to an invitee; and that whether a condition is open and obvious is a question of law to decide by employing an objective standard that does not involve weighing the comparative fault of the parties. This Court has also previously held that: "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 … 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." *Riddle v McLouth Steel Products Corp*, 445 Mich 85, 95 (1992). Should this Court

grant leave to appeal in this case to reassess the standard for all of these facets of the open and obvious danger doctrine which were not previously raised in the trial court or Court of Appeals?

Plaintiffs/Appellants say: Yes

Defendant/Appellee says: No

RECEIVED by MSC 9/14/2021 5:00:33 PM

RECEIVED by MSC 9/14/2021 5:00:33 PM

INTRODUCTION

This is a premises liability case, involving a customer's trip and fall at a Kroger store when the customer attempted to traverse a checkout lane closed by a white cable running across the width of the checkout lane's entrance and through a two-tier basket standing in the middle of the lane. (Kroger Apx Ex A, exemplar photo of set-up of closed checkout lane on incident date, facing into the store aisles; Kroger Apx B, exemplar photo of set-up of closed checkout lane on incident date, facing away from the store aisles; Apx Exh 7-Incident Report/Customer Statement; Apx Exh 8-Evidence Report; Apx Exh 6-Plf Dep, pp25-27; Apx Exh 9-Photo at Scene after fall).

The customer, Plaintiff-Appellant Renee Pinsky, testified that she had noticed the two-tier basket in the middle of the checkout lane but could not explain why she did not also notice the white cable stretching from both sides of it, even though there was nothing obscuring it from her view. (Apx Exh 6-R. Pinsky Dep at pp22-24, 40-41). Renee Pinsky did not claim to be distracted at the time of her fall; nor did her counsel argue that she was distracted in the trial court proceedings. (Apx Exh 6-Plf Dep, p25; Plf Resp to Kroger MSD, p7; Apx Exh 5-MSD transcript).

In the trial court, Kroger moved for summary disposition under MCR 2.116(C)(10), requesting dismissal of Plaintiffs' claims against it because the white cable was open and obvious to an average person of ordinary intelligence on casual inspection, was not effectively unavoidable, and did not create an unusually high risk of severe injury. (Kroger MSD; Apx Exh 5-MSD transcript). The trial court found genuine issues of material fact and denied Kroger's motion. (Apx Exh 5-MSD

RECEIVED by MSC 9/14/2021 5:00:33 PM

transcript, p8; Apx Exh 4-Order Denying MSD).

The Court of Appeals granted leave to appeal to review *de novo* the summary disposition issues raised by Kroger based on the same record on appeal before the trial court. Applying binding premises liability case law to the facts of this case in a light most favorable to the Plaintiffs, the Court of Appeals unanimously held, in an unpublished opinion, that there was no genuine issue of material fact that the condition was open and obvious, and that the evidence established that the condition was neither unavoidable nor posed a substantial risk of death or severe injury. (Apx Exh 1-COA Op). Accordingly, the Court of Appeals reversed the trial court and remanded the case for entry of an order granting Kroger summary disposition. (Id.) The Court of Appeals subsequently denied Plaintiffs' request for reconsideration. (Apx Exh 2-COA Order).

Plaintiffs now ask this Court not only to review the issues addressed in the unpublished Court of Appeals Opinion, but also issues raised for the first time concerning the foreseeability of a customer's distraction inside a store (Plaintiffs' Question Presented II) and concerning whether decades of binding Michigan law applying the open and obvious danger doctrine were correctly decided (Plaintiffs' Question Presented III).

Although Plaintiffs disagree with the Court of Appeals' decision, that decision was not clearly erroneous, nor did it cause material injustice. The preserved issues in this case were fully resolved by the Court of Appeals' straightforward examination, analysis, and application of premises liability precedent to the record evidence in a

RECEIVED by MSC 9/14/2021 5:00:33 PM

light most favorable to Plaintiffs. Renee Pinsky failed to observe a condition which, upon casual inspection under an objective standard, was obvious and did not create an unusually high risk of severe injury.

Further, despite Plaintiffs' request for this Court to consider an unpreserved distraction issue, Renee Pinsky did not claim to be distracted, nor was her hypothetical distraction raised in the trial court.

Lastly, the issues in this case are well-established and embodied in decades of premises liability case law standing for the proposition that the open and obvious danger doctrine is an integral part of the definition of the duty owed by a premises owner to an invitee, and that whether a condition is open and obvious is a question of law to decide by employing an objective standard that does not involve weighing the comparative fault of the parties. See, e.g., *Riddle v McLouth Steel Products Corp*, 445 Mich 85 (1992); *Bertrand v Alan Ford Inc*, 449 Mich 606 (1995); *Lugo v Ameritech Corp Inc,* 464 Mich 512, 522 (2001); *Livings v Sage's Investment Group, LLC*, ___ Mich ___, docket 159692 (6/30/21); 2021 Mich LEXIS 1114 (2021).

This Court has already analyzed how the open and obvious danger doctrine, which attacks the duty element of a premises liability case, relates to a comparative negligence analysis. In *Riddle,* 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 … 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 9/14/2021 5:00:33 PM

Id. at 95.

Accordingly, Kroger respectfully request that this Honorable Court deny leave to appeal.

COUNTER-STATEMENT OF FACTS

A. Material facts.

The Kroger Co. of Michigan operates a grocery store in Ann Arbor. On the evening of February 12, 2018, Renee Pinsky shopped for groceries at the store (where she had shopped often before) and went through a checkout lane operated by a Kroger cashier to pay for her groceries. She noticed that the bag of flour she purchased was torn, so the cashier said she could go get another bag of flour to replace the torn one. (Apx Ex 6-Plf Dep, pp21-23). Mrs. Pinsky walked around to the adjoining checkout lane --lane #12-- and began walking back into the grocery area to get flour. (Id.).

Lane #12 is a wider, handicap-accessible checkout lane. One side of lane #12 has a checkout counter, and the other side has a cigarette display. When Mrs. Pinsky was walking up lane #12 to access the grocery area, lane #12 was closed and blocked off at its entrance end by a white cable strung through a two-tiered basket with baby formula in it, positioned in the middle of lane #12. One end of the white cable was connected to the side of lane #12 with the cigarette display. The cable went through the upper tier of the two-tier basket, and then connected to the side of lane #12 at its checkout counter. (Kroger Apx Ex A, exemplar photo of set-up of closed checkout lane on incident date, facing into the store aisles; Kroger Apx B, exemplar photo of set-up

RECEIVED by MSC 9/14/2021 5:00:33 PM

of closed checkout lane on incident date, facing away from the store aisles; Apx Ex Apx Exh 8-Evidence Report; Apx Exh 6-Plf Dep, pp25-27; Apx Exh 9-Plf photos on night of fall).

Mrs. Pinsky testified that as she was walking up lane #12, she did not believe there was a cashier in that lane, but she was not sure of it (unlike the adjoining lane where she encountered a cashier when paying for her groceries). (Apx Exh 6-Plf Dep, pp22-24).

According to Mrs. Pinsky, as she walked up lane #12, she was looking ahead into the store aisles. She noticed nothing obstructing her path that would have stopped her, and the next thing she knew she was falling to the floor. (Apx Exh 6-Plf Dep, p24) She did not see the white cable across lane #12 before she fell. (Apx Exh 6-Plf Dep, p40). When asked if there was "any reason why you didn't see the wires [the white cable] before the incident occurred?", Mrs. Pinsky answered: "I just can say I did not see it." (Apx Exh 6-Plf Dep, p41).

After she fell, however, Mrs. Pinsky noticed the white cable. It was tangled on her feet and had to be removed from where it was connected to the cigarette display side of lane #12. (Apx Exh 6-Plf Dep, pp24-28, 39-40; Apx Exh 9-Plf photo on night of fall). She also noticed the two-tier basket with baby formula in the center of the lane. Mrs. Pinsky testified that she was aware of the two-tier basket in the middle of the lane before she fell to the extent that she chose to walk around it. (Apx Exh 6-Plf Dep, pp24-28). She testified that it had not been in her walking path, and she was walking to one side of it when she fell. (Id.).

RECEIVED by MSC 9/14/2021 5:00:33 PM

After her fall, but before leaving the store, Mrs. Pinsky and/or her husband took three photos of the area. (Kroger Apx C-Plfs' three photos on night of fall; Apx Exh 6-Plf Dep, pp34-35). Mrs. Pinsky admitted she saw the white cable in those photos, and she is seen in one photo sitting on a chair, next to the small two-tier cart/basket in the center of lane #12, where the white cable is seen going up to the upper part of the checkout counter. (Apx Exh 6-Plf Dep, pp34-37; Kroger Apx C-Plfs' three photos on night of fall).

The incident itself, and the moments before, was captured on video. (Apx Exh 12-CD containing video). At 7:48:08 of the video, the Kroger store manager, Stacee Piasecki, is seen in the upper right portion of the screen, positioning the small two-tiered basket in the center of the lane and then running the white cable through the upper portion of the two-tier basket and connecting it to the opposite side of the checkout lane. Before that time, at 7:45:34, Mrs. Pinsky is seen going through checkout lane #11 on the left of the screen. Mrs. Pinsky then leaves lane #11, and at 7:49:21, she is seen in the upper right portion of the video screen, attempting to go through the closed checkout lane #12, and she falls. (Id.)

After Mrs. Pinsky's fall, manager Piasecki took two exemplar photos demonstrating what the white cable set-up across lane #12 looked like before the fall occurred. (Apx Exh 8-Evidence Report; Kroger Apx A and B, two exemplar set-up photos). Here is one of those photos, showing the set-up from what would have been Mrs. Pinsky's point of view looking back toward the grocery aisles (Kroger Apx A):

RECEIVED by MSC 9/14/2021 5:00:33 PM



Although she did not see the white cable before she fell, Mrs. Pinsky believes the white cable hit just below her knee, based on a red mark seen on her leg afterward. She is 5'8" tall. (Apx Exh 6-Plf Dep, pp40-41, 43-44; Apx Exh 11-photo of leg and red mark).

After Mrs. Pinsky's fall, manager Piasecki came to the area of the fall and wrote out an incident report, as well as an evidence report that includes reference to the two photos manager Piasecki took at 8:40 pm that night, demonstrating what the set-up would have looked like just prior to Mrs. Pinsky's fall. (Apx Exh 7-Incident Report; Apx Exh 8-Evidence Report; Apx Exh 6-Plf Dep, pp30-31). The evidence report also includes a rough sketch diagram describing the scene where the incident occurred. (Apx Exh 8-Evidence Report).

On April 8, 2018, almost two months after her fall, Mrs. Pinsky returned to the Kroger store and took five photos of lane #12 "[t]o document the position of the aisle

RECEIVED by MSC 9/14/2021 5:00:33 PM

that I went through." (Apx Exh 6-Plf Dep, pp31-34; Apx Exh 10-4/8/2018 photo). Those photos show that on April 8, 2018, lane #12 was closed off by a white cable, a two-tier basket, and a shopping cart. (Id.) Mrs. Pinsky admits that those April 8, 2018 photos, which were marked as Exhibits 1 to 5 at her deposition, do not reflect the condition that existed on the evening of her fall. (Apx Exh 6-Plf Dep, pp31-34).

B. Material proceedings.

i. The Circuit Court denies Kroger's motion for summary disposition under MCR 2.116(C)(10).

On February 26, 2019, Plaintiffs filed this lawsuit alleging "negligence/premises liability." (Apx Exh 3-trial court register of actions; see also, Complaint). At the conclusion of discovery, Kroger moved for summary disposition under MCR 2.116(C)(10), arguing this was exclusively a premises liability case, and there were no genuine issues of material fact that the white cable Mrs. Pinsky tripped over was an open and obvious condition, having no special aspects. (See, Kroger's MSD; Apx Exh 3-trial court register of actions).

Plaintiffs opposed Kroger's motion, arguing that reasonable minds could disagree as to whether the white cable was open and obvious, and whether it constituted an unreasonable hazard. (See, Plfs' MSD Response at p8). Plaintiffs argued that the white cable hung below Plaintiff's knees because she had a red mark below her knee after the fall, and that the cable "was clearly not visible upon casual inspection," based on one of the April 2018 photos taken by Mrs. Pinsky months after the fall. (See, Plfs' MSD Response at p3). Plaintiffs did not argue that Mrs. Pinsky

RECEIVED by MSC 9/14/2021 5:00:33 PM

had been distracted at the time of her fall, but rather, pointed out her testimony that she was looking ahead into the store. (See, Plfs' MSD Response, p7; Apx Exh 6-Plf Dep, p25)

Kroger submitted a timely Reply Brief (See, Reply Brief; Apx Exh 1-trial court register of actions), and the trial court heard oral arguments on Kroger's motion on September 12, 2019. (Apx Exh 3-trial court register of actions; Apx Exh 5-MSD transcript).

At the oral arguments, the trial court judge reviewed portions of the Kroger store's surveillance video, which the trial court clerk had originally rejected when submitted with Kroger's motion. Portions of the video were shown to the trial court judge by Plaintiffs' counsel during oral arguments. (Apx Exh 5-MSD transcript, pp6-8).

Thereafter, the trial court stated its ruling as follows:

THE COURT: Thank you. I think a reasonable juror, if not many reasonable jurors, could conclude that that is not open and obvious. It's an unsafe condition. Things could have been done like you have in your Deposition Exhibit A, but that cart can really make it clearly visible. The photo taken shortly after shows it's a trip wire, and I think that there's a material question of fact on whether or not that is a dangerous condition and whether or not it's open and obvious. Therefore, the motion is denied, and have six people to take a look at the same video, hear your arguments and decide for you.

RECEIVED by MSC 9/14/2021 5:00:33 PM

(Apx Exh 5-MSD transcript, p8).

On September 24, 2019, the trial court entered an order denying Kroger's motion for summary disposition for the reasons stated on the record. (Apx Exh 4-MSD Order; Apx Exh 3-trial court register of actions; Apx Exh 5-MSD transcript). Kroger timely filed an Application for Leave to Appeal from that order.

ii. The Court of Appeals reverses the Circuit Court and remands for entry of an order granting summary disposition in Kroger's favor.

On February 11, 2020, the Court of Appeals granted Kroger leave to appeal. On May 27, 2021, the Court of Appeals issued a unanimous unpublished opinion reversing the Circuit Court and remanding the case for an order granting summary disposition in Kroger's favor. (Apx Exh 1-COA Op). The Court of Appeals examined the factual record and applying a *de novo* review, analyzed if there was any genuine issue of material fact, when applying the binding case law on premises liability and the open and obvious danger doctrine, whether the white cable/wire was an open and obvious danger or was unreasonably dangerous. (Id). The Court of Appeals opined that, "Based upon the evidence presented to the trial court, an average person of ordinary intelligence would have been able to see upon casual inspection the cable that extended across the closed checkout lane. … The hazard, therefore, was open and obvious." (Apx Exh 1-COA Op, p4).

The Court of Appeals also held that "the record does not support a finding that the cable posed an unreasonable risk of harm," citing, among other cases, *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 7, 9 (2002) (holding

RECEIVED by MSC 9/14/2021 5:00:33 PM

that snowy and icy steps located outside and "elevated only a couple of feet" were not unreasonably dangerous because: "[I]t cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury or a substantial risk of death.") (Apx Exh 1-COA Op, pp4-5). The Court of Appeals also stated that a "checkout lane closed by a cable is an everyday occurrence that a reasonably prudent person would be expected to see and avoid by choosing an alternative route." (Apx Exh 1- COA Op, p4).

On July 6, 2021, the Court of Appeals denied Plaintiffs' motion for reconsideration, where Plaintiffs raised arguments similar to those previously presented for that court's consideration. (Apx Exh 2-COA Order).

Plaintiffs now seek leave to appeal with this Court, requesting to hold Kroger responsible under theories that are contrary to binding case law.

For the reasons set forth herein, there is no sound basis for involving this Court's discretionary review in this trip and fall premises liability case, and Kroger respectfully requests that this Court deny Plaintiffs' request for leave to appeal.

STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118 (1999). "A motion under [MCR 2.116](C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere

RECEIVED by MSC 9/14/2021 5:00:33 PM

allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." *Maiden*, 461 Mich at 120, quoting MCR 2.116(G)(4).

"Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120, citing MCR 2.116(C)(10), MCR 2.116(G)(4), *Quinto v Cross & Peters Co*, 451 Mich 358 (1996). A genuine issue of material fact exists when reasonable minds could differ upon an issue after viewing the record in the light most favorable to the non-moving party. *West v General Motors Corp*, 469 Mich 177, 183 (2003). The Court must limit its review to the evidence presented up to the time the motion is decided. *Pena v Ingham County Road Commission*, 255 Mich App 299, 313, n 4 (2003).

ARGUMENT

I. Leave to Appeal should be denied because the open and obvious danger doctrine precludes liability - there is no genuine issue of material fact that, as a matter of law, an average person with ordinary intelligence would have discovered the alleged hazard (the white cable closing the checkout lane) upon casual inspection, and the danger of tripping and falling on the ground is not unreasonably dangerous.

A. *The alleged hazard was open and obvious.*

A closed-off checkout lane in a grocery store is not an unusual circumstance for an average customer. In this case, there was a checkout lane closed by a white cable

RECEIVED by MSC 9/14/2021 5:00:33 PM

strung across the width of it, and through a two-tier basket in the middle of the lane. There was nothing blocking the view of someone approaching the two-tier basket – which had the white cable stretching out from both sides - to be able to see not only the basket, but also the white cable. (Kroger Apx A and B, exemplar set-up photos).

Thus, there is no genuine issue of material fact that the white cable was so obvious that an average user with ordinary intelligence would have been able to discover it upon casual inspection.

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516 (2001), citing *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609 (1995). That duty, however, does not encompass removal of open and obvious dangers, unless special aspects make the risk of harm unreasonable despite the openness and obviousness of the condition. *Lugo*, 464 Mich at 517-518. A landowner is not an absolute insurer of any invitee's safety. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712-713 (2007).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish. *Bertrand*, 449 Mich at 609. The doctrine is not merely an exception to a duty generally owed by a premises owner but makes up an integral part of the definition of the duty owed to an invitee. *Lugo*, 464 Mich at 516. The doctrine protects against liability whenever injury would have been avoided had an "open and obvious" danger been observed, regardless of the alleged theories of liability. *Millikin v Walton Manor Mobile Home Park Inc*, 234 Mich App 490, 496-497 (1999). Where a plaintiff

RECEIVED by MSC 9/14/2021 5:00:33 PM

alleges an injury by a condition of the land, her claims sounds exclusively in premises liability. *Id.* at 496. Accord, *Kachudas v Invaders Self Auto Wash Inc*, 486 Mich 913, 914 (2010); *James v Alberts*, 464 Mich 12, 18-19 (2001). This is true even if a plaintiff asserts that a landowner's employees caused the dangerous condition at issue; such allegation does not transform the claim into one for ordinary negligence. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692 (2012).

The open and obvious danger doctrine presents a two-prong analysis. First, it must be determined whether the condition upon which the plaintiff injured herself was open and obvious. Second, it must be determined whether the condition, even if open and obvious, had special aspects or features that made it unreasonably dangerous. *Hoffner v Lanctoe,* 492 Mich 450, 459 (2012); *Lugo,* 464 Mich at 517; *Bertrand,* 449 Mich at 614.

Determining whether a condition is open and obvious is a question of law for the court to decide. *Riddle*, 445 Mich at 95-97. Courts are to employ an objective standard in determining whether a condition is open and obvious. *Kenney v Kaatz Funeral Home Inc*, 264 Mich App 99 (2004) (Griffin, J., dissenting), adopted 472 Mich 929 (2005). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475 (1993). Open and obvious dangers exist where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them. *Riddle*, 440 Mich at 96.

RECEIVED by MSC 9/14/2021 5:00:33 PM

After she fell, Mrs. Pinsky saw the white cable that she fell over. (Apx Exh 6-Plf Dep at pp34-36). It was tangled on her feet and had to be removed from where it was connected to the cigarette display side of lane #12. (Apx Exh 6-Plf Dep, pp24-28, 39-40; Kroger Apx Exh C-Plfs' three photos 2/12/18). The white cable is visible in the photographs that Mr. Pinsky took on that same evening of his wife's fall, and also in the photos taken that night by store manager demonstrating what the set-up of the white cable and two-tier basket had looked like that night before the fall occurred. (Kroger Apx C-Plfs' three photos 2/12/18; Apx Exh 6-Plf Dep at pp32-38; Kroger Apx A and B, exemplar set-up photos; Apx Exh 8-Evidence Report). Mrs. Pinsky admitted at her deposition she was able to see the white cable in the three photographs taken that night by her husband, which she was shown at her deposition. (Apx Exh 6-Plf Dep at pp34-36; Kroger Apx C-Plfs' three photos 2/12/18).

Mrs. Pinsky also admitted at her deposition that, before she fell, she *was aware* of the two-tiered basket with baby formula in the center of the lane. (Apx Exh 6-Plf Dep, pp24-28). She testified that the two-tiered basket had not been in her walking path, and she was walking to one side of it when she fell. (Id). She had absolutely no explanation, however, as to why she also did not see the white cable before she fell. Mrs. Pinsky testified that before she fell, she was "looking ahead into the store." (Apx Exh 6-Plf Dep at p25). She was asked: "Is there any reason why you didn't see the wire before the incident occurred?," she answered: "I just can say that I did not see it." (Apx Exh 6-Plf Dep at p41).

The Court of Appeals was correct to hold that there is no genuine issue of

RECEIVED by MSC 9/14/2021 5:00:33 PM

material fact that the condition was open and obvious. Mrs. Pinsky unfortunately just wasn't looking where she was walking; rather, she was looking to the back of the store, beyond the white cable and the two-tiered basket in the middle of closed checkout lane #12. As such, she made no observation of the white cable that was visible right in front of her, which was connected to both sides of the two-tiered basket that she had noticed in the middle of the lane before her fall.

If the open and obvious danger doctrine's requirement of "casual inspection" is to mean anything, it must at a minimum mean looking at one's surroundings, even if momentarily." *Brooks v Bruce Campbell Dodge, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals issued Sept. 23, 2010 (Docket No. 293039)[2] (Kroger Apx D).

The Court of Appeals' Opinion acknowledges the evidence that Mrs. Pinsky has no explanation as to why she did not see the white cable before she fell, but she was looking ahead into the store, and nothing obstructed her view. (Apx Exh 1-COA Op, pp3-4). She admitted she had noticed the two-tiered basket the white cable was attached to before her fall, and that she saw the cable after she fell, and that also saw the cable shown in the photos taken on the accident date. (Apx Exh 6-Plf Dep, pp24-28, 34-36; Apx Exh 1-COA Op, pp3-4). The Court of Appeals noted that if a condition creates a risk of harm solely because the plaintiff failed to notice it, the open and

[2] Kroger cited to this unpublished opinion in support of summary disposition in the trial court (Kroger MSD brief at p11), and because the opinion contains a relevant and concise statement reflecting on what "casual observation" entails, Kroger also cited to it in its Court of Appeals brief on appeal, and here. MCR 7.215(C)(1).

RECEIVED by MSC 9/14/2021 5:00:33 PM

obvious danger doctrine eliminates the property owner's liability if the plaintiff should have discovered the defect and realized its danger. *Bertrand*, 449 Mich at 611. (Apx Exh 1-COA Op, p4).

For example, in *Kennedy, supra,* a case involving a slip and fall on grapes on the floor of a grocery store, the Court of Appeals stated:

> Turning to the case at bar, plaintiff argues that the slipping hazard posed by the crushed grapes or grape residue on defendant's floor was not open and obvious. We cannot agree. Plaintiff asserts that the crushed grape residue was green and brown in color and that the slipping hazard was therefore inconspicuous against the backdrop of the beige supermarket floor. He further asserts that the grape residue "was a film," "was at floor level" and "did not stick up above the floor." However, plaintiff also testified during his deposition that the crushed grapes *were readily observable after he slipped and that he and several other people all noticed the existence of the crushed grapes and grape residue once they actually looked at the floor*.
>
> * * *
>
> Plaintiff's contention that the crushed grapes and grape residue were not open and obvious is thus belied by his own deposition testimony. [*Kennedy,* 274 Mich App at 713 (emphasis added)].

Here, analogous to the grapes on the store's floor in *Kennedy,* the white cable strung across the checkout lane, through a two-tier basket in the middle of the lane, was open and obvious. Not only does Mrs. Pinsky's own deposition testimony support that conclusion, but also, photos taken by Mr. Pinsky shortly after his wife's fall, including the photo on the next page, show that the white cable contrasts with the store's floor, is connected to a visible two-tier basket, and is otherwise observable by

RECEIVED by MSC 9/14/2021 5:00:33 PM

a person approaching it[3]:

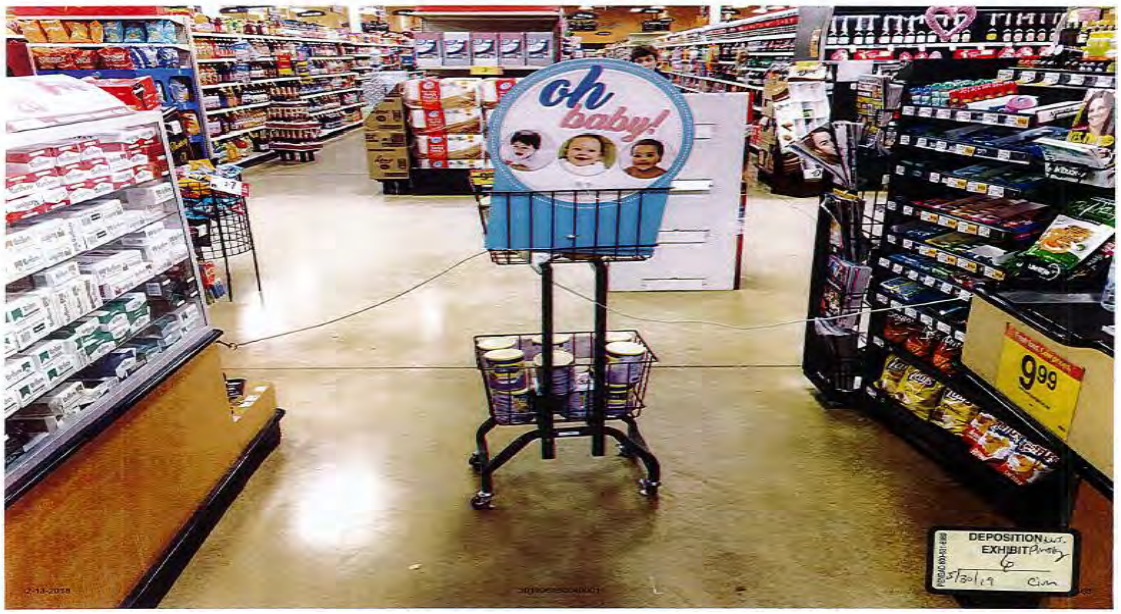


(Kroger Apx C-Plfs' three photos 2/12/18; Apx Exh 6-Plf Dep at pp32-38).

And the Kroger store manager's exemplar photos of the closed checkout lane set-up, including the one shown below, depict how the set-up and position of the white cable would have looked before being tangled up in Mrs. Pinsky's feet from the fall (Kroger Apx A and B-exemplar set-up photos; Apx Exh 6-Plf Dep, pp24-28, 39-40):

[3] As mentioned above, Mrs. Pinsky returned to take five photos at the store on April 8, 2018. She testified that those photos were "[t]o document the position of the aisle that I went through." (Apx Exh 6-Plf Dep, pp31-34). Those April 8, 2018 photos were marked as Exhibits 1 to 5 at her deposition, and were later included in, and attached as exhibits to, Plaintiffs' response in opposition to summary disposition in the trial court. (Plf Resp to MSD at p3; Exhs A and F to Plf Resp to MSD). But Mrs. Pinsky admitted during her deposition that the April 8, 2018 photos do not accurately reflect the condition that existed on the evening of her fall on February 12, 2018. (Apx Exh 6-Plf Dep, pp31-34; Plf's Resp to MSD, p3; Exhs A and F to Plfs' Resp to MSD).

RECEIVED by MSC 9/14/2021 5:00:33 PM



Also, the height of the visible white cable does not create an exception to whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney,* 198 Mich App at 475. Mrs. Pinsky admitted that, before she fell, she was aware of the two-tier basket in the middle of the lane, but she cannot explain why she did not see the white cable that was connected on both side of the two-tier basket. (Apx Exh 6-Plf Dep, pp24-28, 41). And the Court of Appeals correctly held that: "[T]he height of the wire alone is not dispositive of whether the hazard was open and obvious because even floor-level hazards can be open and obvious, and therefore, a cable at knee level is not too low to be open and obvious. See *Kennedy*, 274 Mich App at 713, 722." (Apx Exh 1-COA Op, p4). There is a plethora of Michigan case law, both published and unpublished, involving slip and falls caused by conditions on the land existing below knee level,

RECEIVED by MSC 9/14/2021 5:00:33 PM

such as the conditions of a floor or on the ground itself.[4] Thus, the Court of Appeals did not err in holding that the alleged level of the cable being below knee level does not, by itself, defeat its open and obviousness.

Reasonable minds could not differ that upon casual inspection, an average user with ordinary intelligence would have been able to discover not only the two-tiered basket standing the middle of the checkout lane, but also the white cable stretched across the lane, at through both sides of the top of the two-tier basket. Failing to see a condition before it is encountered does not eliminate the application of the open and obvious danger doctrine. The photographic evidence (including photos taken by Mr. Pinsky on the night of his wife's fall) shows how the white cable contrasts with the store's floor, is connected to a visible two-tier basket in the center of a closed checkout lane and is otherwise observable by a person approaching it. (See, Kroger Apx C-Plfs' three photos 2/18/18; Apx Exh 6-Plf Dep at pp32-38; Kroger Apx A and B-exemplar photos of set-up).

The Court of Appeals panel correctly held that, as a matter of law, the condition was open and obvious.

B. *The risk of falling on the ground is not unreasonably dangerous.*

An open and obvious hazard that ordinarily precludes liability can have special

[4] See, e.g., *Lugo v Ameritech Corp*, 464 Mich 512 (2001) (pothole at ground level in parking lot was open and obvious); *Joyce v Rubin,* 249 Mich App 231 (2002) (ice at ground level on a sidewalk was open and obvious); *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710 (2007) (grape residue on store's floor was open and obvious).

RECEIVED by MSC 9/14/2021 5:00:33 PM

aspects that give rise to liability in one of two ways: (1) the hazard is, in and of itself, unreasonably dangerous, or (2) the hazard was rendered unreasonably dangerous because it was effectively unavoidable for the injured party. *Hoffner*, 492 Mich at 472–473; see also, *Lugo*, 464 Mich at 517–519. This Court has emphasized that "exceptions to the open and obvious doctrine are narrow and designed to permit liability for such dangers only in limited, extreme situations." *Hoffner,* 492 Mich at 472. "[L]iability does not arise for open and obvious dangers unless special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Id.* at 455.

Here, the Court of Appeals did not err in holding that there is also no genuine issue of material fact that, as a matter of law, the risk of tripping on the white cable was not unreasonably dangerous. (Apx Exh 1-COA Op, pp4-5).

Under Michigan law, an "'unreasonably dangerous' hazard must be just that--not just a dangerous hazard, but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous…" *Hoffner*, 492 Mich at 472. A condition is unreasonably dangerous if it poses 'a substantial risk of death or severe injury." *Lugo*, 464 Mich at 518.

In *Bullard v Oakwood Annapolis Hospital*, 308 Mich App 403, 410 (2014), the Court of Appeals stated that "the question of what constitutes an unreasonably dangerous condition is a question of law." "An example of an open and obvious hazard that is unreasonably dangerous is 'an unguarded thirty-foot-deep pit in the middle of a parking lot.'" *Id.* at 410-411, quoting *Lugo*, 464 Mich at 518.

Here, a visible white cable strung across a checkout lane through a visible two-

RECEIVED by MSC 9/14/2021 5:00:33 PM

tier basket in the middle of the lane is a far cry from the unguarded thirty-foot-deep pit in the middle of a parking lot example given in *Lugo*. Also, the Court of Appeals has stated that "[f]alling several feet to the ground is not the same thing as falling an extended distance such as into a thirty-foot deep pit." *Corey v Davenport College of Business (On Rem.)*, 251 Mich App 1, 7 (2002) (snowy and icy steps located outside and "elevated only a couple of feet" were not unreasonably dangerous). "[I]t cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury or a substantial risk of death." *Id.*

Here, the elevation of falling to the floor from a standing position is even less than falling from the few elevated steps at issue in *Corey, supra*. Therefore, a "severe injury or a substantial risk of death" would not be expected to occur to a typical person falling on the floor of a store.

Additionally, although Plaintiffs argue that the height of the white cable made it unreasonably dangerous, the height of the cable does not make it any less visible. Especially since spills, potholes, floor mats, and other hazards on the ground/floor itself are not *ipso facto* unreasonable dangerous because of their height (or lack thereof).

A plaintiff may not recover if the condition is "so common that the possibility of [its] presence is anticipated by prudent persons." *Bertrand,* 449 Mich at 615 (citation omitted). It is our collective common experience as average adults, and a store may have closed checkout lanes where there is no cashier manning it. Here, the white cable across the closed checkout lane, running through a basket in the middle of the

RECEIVED by MSC 9/14/2021 5:00:33 PM

lane, was meant to alert customers that the lane was closed for their use. It as not an uncommon occurrence, as the Court of Appeals correctly noted. (Apx Exh 1-COA Op, p4).

The visible white cable strung across a checkout lane through a visible two-tier basket in the middle of the lane does not, as a matter of law, rise to the level of an "unreasonably dangerous" hazard because it does not pose a substantial risk of death or severe injury. The Court of Appeals correctly held that no genuine issue of material fact existed about whether the condition was unreasonably dangerous. (Apx Exh 1-COA Op, p4).

II. The facts of this case do not involve a distracted customer, nor was distraction argued in the trial court. This Court should deny leave to appeal of an unpreserved question regarding whether a premises owner should anticipate that harm may result to its customer, even though the condition is open and obvious, if it is foreseeable that its customer will be distracted.

In their Argument II, Plaintiffs assert that the Court of Appeals overlooked addressing whether Kroger should have anticipated harm to an invitee despite the open and obvious nature of the condition. (Appl. at p13). This is incorrect, because that issue was addressed by the Court of Appeals' analysis of the "unreasonably dangerous" special aspect question of the open and obvious doctrine under *Lugo*, 464 Mich at 516-517, and *Bertrand*, 449 Mich at 614, and *Riddle*, 440 Mich at 96. (Apx Exh 1-COA Op, pp4-5). Further, Renee Pinsky did not testify that she was distracted by anything at the time of her fall, nor did Plaintiffs raise that issue in the trial court.

Plaintiffs' Argument II emphasizes the following passage from *Riddle*: "[W]here

RECEIVED by MSC 9/14/2021 5:00:33 PM

the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle*, 440 Mich at 96. In *Bertrand*, this Court considered that passage from *Riddle* and analyzed the "should anticipate the harm despite knowledge of it on behalf of the invitee" portion of it, stating:

> When [Restatement Torts, 2d] §§ 343 and 343A are read together, the rule generated is that if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. *On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions*. [*Bertrand,* 449 Mich at 611 (emphasis added)].
>
> ***
>
> With the axiom being that the duty is to protect invitees from *unreasonable risks of harm*, the underlying principle is that *even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees*. [citation omitted]. Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be special aspects of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe. [*Bertrand,* 449 Mich at 614 (emphasis added)].
>
> ***
>
> *If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide*. [citation omitted]. [*Bertrand,* 449 Mich at 617 (emphasis added)].

RECEIVED by MSC 9/14/2021 5:00:33 PM

Six year following *Bertrand*, the *Lugo* Court looked to this precedent and summed it up stating: "In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517. The *Lugo* Court concluded that, with regard to open and obvious dangers:

> [T]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].

Here, the Court of Appeals did not overlook this issue, but rather, appropriately analyzed whether the particular condition at issue was unreasonably dangerous because the risk of harm remained unreasonable despite its obviousness. (Apx Exh 1-COA Op at p4). Citing *Lugo*, 464 Mich at 518, the Court of Appeals stated: "A condition is unreasonably dangerous if it posed 'a substantial risk of death or severe injury.'" (Apx Exh 1-COA Op at p4). For the reasons stated in Argument I-B, *supra*, the Court of Appeals correctly concluded that the condition was not unreasonably dangerous, stating that the evidence "indicated that nothing unreasonably dangerous about the visible cable across the closed checkout lane existed that made the condition unreasonably dangerous or unavoidable warranting

RECEIVED by MSC 9/14/2021 5:00:33 PM

the imposition of liability." (Apx Exh 1-COA Op at p4).

Additionally, the fact that the Kroger store manager created the alleged dangerous condition is evidence of actual notice of the condition, but it does not change the open and obvious danger doctrine analysis.

In *Buhalis,* the plaintiff asserted that the defendant's employees caused the dangerous condition at issue (icy area of the ground), and therefore the case sounded in ordinary negligence. The Court of Appeals held that the claim involved an injury caused by a condition on the land, so it sounded exclusively in common-law premises liability claim to which the open and obvious danger doctrine applied, regardless of who created the condition. *Buhalis*, 296 Mich App at 692. This holding is logical in light of the objective nature of an open and obvious analysis of the condition, and perspective of the condition, by an average person of ordinary intelligence. *Novotney,* 198 Mich App at 475.

Additionally, Plaintiffs' "distraction" argument was not asserted in the trial court, nor does the evidence support that claim, nor is distraction a special aspect of the open and obvious danger doctrine.

In the trial court, Plaintiffs opposition to Kroger's Motion for Summary Disposition did not include an argument that Renee Pinsky was "distracted" by the two-tier display cart in the middle of the closed checkout lane, or anything else. (Apx Exh 5-MSD transcript). Rather than claiming to be "distracted," Plaintiffs' Response to Defendant's Motion for Summary Disposition, at p7, argued:

RECEIVED by MSC 9/14/2021 5:00:33 PM

In this case, Plaintiff testified that she was looking directly at the pathway in front of her but saw nothing.

Q. As you were looking through that aisle, what I will call the checkout lane, where were you looking?
A. Ahead.
Q. And as you were looking ahead you saw nothing in the aisle?
A. No, I was looking ahead into the store.

(Exhibit D, Plaintiff's deposition, page 25)

In contrast to what was argued in the trial court, Plaintiffs' Application for Leave to Appeal asserts that "Renee Pinsky testified that she was looking at the display cart for baby formula when she tripped and fell down. In short, she was too focused on displayed goods." (Appl. at p15). This is inaccurate, as Plaintiffs' Response to Defendant's Motion for Summary Disposition pointed out in the trial court in emphasizing the above portion of Renee Pinsky's deposition testimony. (Apx Exh 6-Plf Dep, p25). While Renee Pinsky admitted she observed the two-tier basket in the lane before she fell (Apx Exh 6-Plf Dep, pp24-28), she did not claim to be distracted, nor did she claim to be looking at the two-tier cart in the middle of the closed checkout lane when she fell.

Further, distraction is not a special aspect or exception to the objective open and obvious analysis. See, *Lugo*, 464 Mich at 522 (plaintiff claimed distracting traffic in parking lot; it was not a special aspect); *Kennedy,* 274 Mich App at 714-719 (plaintiff claimed distracting displays and merchandise in supermarket; it was not a special aspect). There is no heightened standard of care in premises liability cases for supermarkets (or busy parking lots). See, *Charleston v Meijer, Inc*, 124 Mich App 416, 419 (1983); *Kennedy*, 274 Mich App at 714-719. Premises owners, including grocery

RECEIVED by MSC 9/14/2021 5:00:33 PM

stores, are not absolute insurers of the safety of their invitees. *Bertrand,* 449 Mich at 614.

This Court's recent decision in *Livings v Sage's Investment Group, LLC*, ___ Mich ___, docket 159692 (6/30/21); 2021 Mich LEXIS 1114 (2021), a case relied on by Plaintiffs here, also does not support Plaintiffs' "unreasonably dangerous" argument either.

In *Livings,* this Court granted oral argument on the defendant's application to address "(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." *Livings v Sage's Investment Group, LLC*, 505 Mich 985, 985 (2020). This Court answered "yes" to both of those questions. *Livings,* 2021 Mich LEXIS 1114 at *3-*4, *8. *Livings* focused analysis of "the 'special aspect' of unavoidability," as discussed in *Lugo* and applied in *Hoffner*. *Id.* at *9. *Livings* stated that even if Michigan's premises liability law's "current framework uses different terminology," it is consistent with the Restatement approach. *Livings,* 2021 Mich LEXIS 1114 at *14, citing *Hoffner*, 492 Mich at 479 (Michigan's current standard used for open and obvious analysis is consistent with Restatement Torts, 2d § 343 and § 343A).

Unlike in *Livings,* the present case involves neither the consideration of Renee Pinsky's employment, nor whether the condition at issues effectively unavoidable.

In the instant case, the Court of Appeals applied the current premises liability

RECEIVED by MSC 9/14/2021 5:00:33 PM

law to the facts of the case in a light most favorable to the Plaintiff when it unanimously concluded that the condition was open and obvious and was not unreasonably dangerous. Renee Pinsky did not claim to be distracted at the time of her fall, nor did Plaintiffs present a distraction argument in the trial court. Further consideration of this unpreserved issue by this Court is not warranted, and Kroger respectfully requests that this Honorable Court deny Plaintiffs' request for leave to appeal.

III. Leave to appeal should be denied because decades of Michigan law makes clear that the open and obvious danger doctrine attacks the duty element of a premises liability case; that it is an integral part of the definition of the duty owed by a premises owner to an invitee; and that whether a condition is open and obvious is a question of law to decide by employing an objective standard that does not involve weighing the comparative fault of the parties. The duty element and the comparative negligence standard are fundamentally exclusive; they are two doctrines to be utilized at different junctures in the determination of liability.

The issue of whether *Lugo, Riddle, Bertrand,* and other premises liability cases were wrongly decided is a new argument in this case. Plaintiffs ask this Court to grant leave to appeal to consider a new premises liability law standard, departing the progeny of binding precedent dating back decades, and to instead essentially turn a premises liability case into an ordinary negligence case. This Court, however, has previously spoken to reject that proposition years ago.

First, Plaintiffs emphasize the fact that the condition at issue was created by the Kroger store manager's set-up closing the checkout lane. While this fact would go to Kroger's actual notice of the condition, it does not change the application of the

RECEIVED by MSC 9/14/2021 5:00:33 PM

objective standard applied in the open and obvious analysis to this premises liability case. See, *Buhalis,* 296 Mich App at 692 (a premises liability claim is not transformed into a general negligence claim because the plaintiff asserted that the premises owners' employees caused the dangerous condition at issue, and that the open and obvious danger doctrine is applicable to such a premises liability claim).

Second, contrary to Plaintiffs' arguments, the current state of the law does not "immunize" Kroger, or any other premises owner, from premises liability when warranted by a genuine issue of material fact regarding the existence of duty as well as breach See, e.g., *Bertrand,* 449 Mich at 617; *Livings, supra.*

Plaintiffs also ask this Court to consider non-binding foreign case law[5] and Restatement Torts, 3d, in support of their argument that the open and obvious doctrine should be considered in a comparative negligence analysis, not when considering duty, as the current state of Michigan law provides. Rather than looking to potential persuasive authority, this Court can look to its own binding precent which considered and rejected a similar argument.

In *Riddle,* this Court reversed a lower court's determination that the open and obvious danger doctrine was "inconsistent with comparative negligence and should be abolished." *Riddle,* 440 Mich at 95. In that regard, the *Riddle* 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*

[5] *Kentucky River Med Center v McIntosh,* 319 SW3d 385 (2010); *Horne v Precision Cars of Lexington, Inc*, 170 SW3d 364 (2005); *Foster v Costco Wholesale Corp*, 291 P3d 150 (2012); *Steigman v Outrigger Enterprises Inc*, 267 P3d 1238 (2011).

RECEIVED by MSC 9/14/2021 5:00:33 PM

> *negligence standard are fundamentally exclusive -- two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action.*
>
> The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. *Antcliff v State Employees Credit Union*, 414 Mich 624; 327 NW2d 814 (1982). In other words, the court determines the circumstances that must exist in order for a defendant's duty to arise. *Smith v Allendale Mut Ins Co*, 410 Mich 685, 714-715; 303 NW2d 702 (1981). See, generally, Prosser & Keeton, Torts (5th ed), ch 5. [*Riddle*, 440 Mich at 95 (emphasis added)].

The *Riddle* Court pointed out that "[o]nce the [premises owner's] legal duty is established, the reasonableness of [its] conduct under that standard is generally a question for the jury." *Riddle,* 440 Mich at 96. The open and obvious question is part of the *duty* element that must be established by the Court as a matter of law before any comparative negligence analysis can follow. "Although the adoption of comparative negligence may have limited a defendant's defenses [versus contributory negligence], the defendant's initial duty has not been altered." *Id.* at 98.

In *Riddle,* this Court rejected a standard that Plaintiffs here would like to have this Court reconsider. Specifically, the *Riddle* Court held there was reversible error in a lower court's statement to the jury that "[t]he possessor must warn the invitee of dangers of which it knows or has created … ," because it incorrectly gave the impression that a premises owner's "duty to warn an invitee of conditions on the premises is absolute and ever present." *Riddle,* 440 Mich at 101. There is no "absolute duty" to warn or protect an invitee from an open and obvious danger, absent special aspects. *Riddle,* 440 Mich at 92-95.

Lastly, Plaintiffs complain that the current open and obvious danger doctrine

RECEIVED by MSC 9/14/2021 5:00:33 PM

puts more of a burden on them than the premises owner. But this argument ignores an "[o]verriding public policy that people should 'take reasonable care for their own safety' and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable." *Buhalis,* 296 Mich App at 693-694, citing *Bertrand*, 449 Mich at 616-617.

Analysis of foreign case law or adoption of Restatement Torts, 3d is unnecessary to consider, inasmuch as this Court has previously analyzed how the open and obvious danger doctrine, which attacks the duty element of a premises liability case, relates to a comparative negligence analysis, and rejected similar arguments now brought by Plaintiffs in this case.

RELIEF

Wherefore, Defendant-Appellee THE KROGER CO. OF MICHIGAN, requests this Honorable Court deny leave to appeal, allowing the unanimous unpublished Court of Appeals Opinion to stand.

Respectfully submitted,
LANDRY, MAZZEO & DEMBINSKI, P.C.

BY: */s/ Nancy Vayda Dembinski*
NANCY VAYDA DEMBINSKI (P54144)
Attorney for Defendant-Appellee Kroger
37000 Grand River Avenue, Suite 200
Farmington Hills, MI 48335
(248) 476-6900
ndembinski@lmdlaw.com