STATE OF MICHIGAN

COURT OF APPEALS

SHERYL L. SPIGNER,

Plaintiff-Appellee/Cross-Appellee,

v

YARMOUTH COMMONS ASSOCIATION and KRAMER-TRIAD MANAGEMENT GROUP, LLC,

Third-Party Plaintiffs-Defendants/Cross-Appellants,

and

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 30, 2014

No. 315616
Macomb Circuit Court
LC No. 2011-002037-NO

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover for injuries sustained in a fall, third-party defendant, W&D Landscaping & Snow Plowing, Inc., appeals by leave granted the trial court's order denying W&D Landscaping's motion to dismiss the statutory and premises liability claims by plaintiff, Sheryl L. Spigner, against defendants, Yarmouth Commons Association (the Association) and Kramer-Triad Management Group, LLC. On cross-appeal, the Association and Kramer-Triad similarly argue that the trial court erred when it denied W&D Landscaping's motion, which they joined, but also argues the trial court erred when it denied their motion for summary disposition of their third-party claims against W&D Landscaping. For the reasons more fully explained below, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

In February 2011, Spigner was living with her mother. Her mother's home was part of a four-unit condominium in the Yarmouth Commons site condominium complex. The Association owns and maintains the common areas within the condominium complex and Kramer-Triad manages the common areas on the Association's behalf. The Association contracted with W&D Landscaping to provide snow plowing for the Association's roads.

Spigner's mailbox was located in a stand of mailboxes positioned along the edge of a road. In February 2011, Spigner was with her boyfriend, Terry Wadowski, who was driving her mother's Jeep. After Spigner asked him to do so, he stopped in the road and Spigner got out so she could get her mail. She walked to her mailbox, but, because there was snow built up around the mailbox, she had to lean in to open it. Wadowski testified at his deposition that the snowbank was so large that he could not have gotten the Jeep close enough to retrieve the mail. After she got the mail, Spigner pushed off the mailboxes, turned toward the Jeep, took a couple steps, slipped on snow and ice, and fell.

In May 2011, Spigner sued the Association and Kramer-Triad for failing to properly maintain the roadway in front of her mailbox. Specifically, she alleged that, because the Association and Kramer-Triad failed to properly clear the roadway, she "was forced to walk through an area of snow and ice" in the Association's roadway to reach her mailbox, slipped, fell, and suffered "severe injuries." She further alleged that the Association and Kramer-Triad's failure to properly clear the roadway constituted a breach of their common law duties to maintain the roadway and also constituted a breach of duties under MCL 554.139, MCL 125.536, and applicable local ordinances.

After the trial court granted leave in August 2011, the Association and Kramer-Triad sued W&D Landscaping in a third-party complaint. The Association and Kramer-Triad alleged that the Association had contracted with W&D Landscaping to provide, in relevant part, snow removal for its roads. The contract required W&D Landscaping to remove the snow from around mailbox stands within the complex. W&D Landscaping also agreed to obtain insurance covering its activities and naming the Association and Kramer-Triad as additional named insureds. It also agreed to defend and indemnify the Association and Kramer-Triad for any losses arising from its performance under the contract. The Association and Kramer-Triad alleged that, if Spigner's claims are true, W&D Landscaping breached its contractual duty to properly clear the areas around the mailbox stands and, for that reason, is obligated to provide the Association and Kramer-Triad with a defense and indemnify them for any damages, including costs and attorney's fees.

In August 2012, W&D Landscaping moved for summary disposition of Spigner's complaint against the Association and Kramer-Triad under MCR 2.116(C)(10). W&D Landscaping argued that the snow and ice in front of the mailbox constituted an open and obvious hazard and, as such, the Association and Kramer-Triad had no duty to warn about or rectify the hazard under Michigan's common law. It also argued that MCL 554.139 did not apply because Spigner did not have a landlord-tenant relationship with the Association or Kramer-Triad. Because the Association and Kramer-Triad had no duty to warn or rectify the hazard at issue, W&D Landscaping asked the trial court to dismiss the claims against the

Association and Kramer-Triad. The Association and Kramer-Triad later moved for summary disposition on its own behalf on the grounds stated in W&D Landscaping's motion and brief.

In that same month, W&D Landscaping also moved for summary disposition of the Association and Kramer-Triad's third-party claims. It argued that Spigner's testimony established that she slipped on ice, not snow. Further, its contract with the Association and Kramer-Triad did not include salting. Because Spigner's fall did not involve a condition resulting from W&D Landscaping's failure to perform under its contact, it had no obligation to defend or indemnify the Association or Kramer-Triad. Further, even conceding for purposes of its motion that it failed to add the Association and Kramer-Triad to its insurance, W&D Landscaping argued that the Association and Kramer-Triad could not establish any harm because Spigner's fall would not have triggered the policy's coverage. Accordingly, W&D Landscaping asked the trial court to dismiss the Association and Kramer Triad's third-party claims.

In response to W&D Landscaping's motion for summary disposition of their third-party claims, the Association and Kramer-Triad argued that the contract required W&D Landscaping to remove the snow from in front of the mailbox stand, which evidence showed it did not do. Because Spigner testified that she fell after she pushed off her mailbox, which she had to do because the snow was not cleared from in front of it, a reasonable jury could conclude that W&D Landscaping's failure to remove the snow, as required by the contract, caused Spigner's fall. It also argued that the snow bank may have melted and thereby caused the ice to form in the road. They maintained that the trial court should deny W&D Landscaping's motion for summary disposition on these grounds.

In response to W&D Landscaping's motion for summary disposition, Spigner argued that the open and obvious danger doctrine did not apply to the duty owed to her by the Association and Kramer-Triad because the duty was statutory. She argued that MCL 559.241 required all condominium associations to comply with local law and a local ordinance required them to maintain the common areas. She also argued that the Association and Kamer-Triad had a duty to maintain the common areas under MCL 554.139 and MCL 125.536. Finally, Spigner argued that the open and obvious danger doctrine did not bar her claim because the hazard at issue was effectively unavoidable.

The trial court entered an opinion and order addressing the motions in November 2012. The court first determined that there was a question of fact as to whether the snow and ice around the mailbox was effectively unavoidable. As such, the open and obvious danger doctrine did not necessarily bar recovery. It also determined that there was a question of fact as to whether Spigner fell as a result of ice or as a result of the snow and the snowbank surrounding the mailboxes. Depending on how the jury resolved the factual dispute, the court explained, W&D Landscaping could be liable to defend and indemnify the Association and Kramer-Triad and could be liable for failing to have the Association and Kramer-Triad named as additional insureds. The trial court, however, rejected Spigner's contention that MCL 554.139 applied to condominiums. The trial court did not address whether the remaining statutes and ordinance identified by Spigner in response to the motions applied to the facts of this case. The trial court denied W&D Landscaping's motions for summary disposition as to Spigner's common law claim, but granted it with respect to her claim premised on MCL 554.139. The trial court also

denied W&D Landscaping's motion for summary disposition of the Association and Kramer-Triad's third-party claims.

W&D Landscaping moved for reconsideration of the trial court's opinion and order in December 2012. It argued that the hazard at issue did not have special aspects that would except the hazard from the open and obvious danger doctrine. Specifically, it argued that the hazard had to be effectively unavoidable and pose an unreasonable risk of severe harm: "Thus, even an unavoidable condition will not be a 'special aspect'—and the open and obvious defense will apply—if it does not pose a risk that differs from 'ordinary conditions.'" Because the evidence showed that the snow and ice was avoidable—she could have refused to encounter the hazard or could have driven up to the mailboxes—and did not pose a severe risk of harm, it maintained, the trial court erred when it concluded that there was a question of fact as to whether the open and obvious danger doctrine applied.

In January 2013, the trial court entered an opinion and order granting W&D Landscaping's motion for reconsideration. The court stated that it erred when it concluded that there was a question of fact as to whether the hazard at issue was effectively unavoidable. The court stated that our Supreme Court's recent decision in *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), clarified when a hazard is effectively unavoidable. In particular, the court stated that Spigner had to show that she was "inescapably compelled" to encounter the hazard and, because she did not have to get her mail at that time, she could not establish that the hazard was effectively unavoidable. The court noted in passing that it had not dismissed Spigner's claims under MCL 559.241, which incorporated local ordinances, and was not subject to the open and obvious danger doctrine. The trial court, therefore, dismissed Spigner's common law claim on reconsideration.

In February 2013, W&D Landscaping moved for summary disposition of Spigner's remaining statutory claim. It argued that MCL 125.536 does not apply to condominium associations and, as such, Spigner's claim premised on that statute must be dismissed. W&D Landscaping also argued that Spigner did not plead a claim under MCL 559.241 and, in any event, that statute (and any underlying ordinance or code violation) does not impose a duty that is actionable as a private right of action; rather, the violation of such a statute constitutes evidence of negligence for purposes of the common law. The Association and Kramer-Triad moved for summary disposition of Spigner's remaining claims for the reasons stated in W&D Landscaping's motion.

In response to W&D Landscaping's newest motion for summary disposition, Spigner argued that MCL 559.241 plainly established a statutory duty to comply with local ordinances. And, because a local ordinance required the Association and Kramer-Triad to keep the common areas free of hazards, Spigner could sue for a breach of that duty under MCL 559.241. In a separate motion, Spigner also challenged W&D Landscaping's standing to move for summary disposition of the claims against the Association and Kramer-Triad.

Spigner moved for reconsideration of the trial court's opinion and order dismissing her premises liability claim on the grounds that the hazard was not excepted from the open and obvious danger doctrine. The trial court entered an opinion and order denying Spigner's motion for reconsideration in March 2013.

Spigner then moved for relief from the trial court's January and March opinions and orders. Spigner argued that the decision in *Hoffner* was limited to situations involving a plaintiff's mere business interest in confronting a hazard. A person has a much stronger interest, she maintained, in retrieving his or her mail. Moreover, because there was evidence that she had reported the problem with the mailboxes and nothing was done to remove the hazard, the hazard obstructing her mailbox was effectively unavoidable. Spigner asked the trial court to reinstate her premises liability claim on that basis.

The trial court granted Spigner's motion for relief in March 2013. For that reason, in April 2013, the trial court entered an order denying W&D Landscaping's motion for leave to file a motion for summary disposition and denied its motion for summary disposition.

In June 2013, the Association and Kamer-Triad moved for summary disposition on their claims against W&D Landscaping. They argued that the contract required W&D Landscaping to provide clear access to the mailboxes and it was W&D Landscaping's failure to do so that led to the present litigation. They also maintained that the undisputed evidence showed that W&D Landscaping failed to name them as an additional insured on its policy, failed to provide them with a defense, and refused to indemnify them, as required under the contract. The Association and Kramer-Triad accordingly asked the trial court to enter judgment in their favor on their breach of contract claims, subject only to a later determination of damages.

The trial court denied the Association and Kramer-Triad's motion for summary disposition of their claims against W&D Landscaping in August 2013.

These appeals followed.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court properly applied the common law. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 572-573; 844 NW2d 178 (2014). Finally, this Court reviews de novo whether the trial court properly selected, interpreted, and applied any applicable statutes and ordinances. *Younkin v Zimmer*, 304 Mich App 719, 726; 848 NW2d 488 (2014); *Gmoser's Septic Service, LLC v Charter Twp of East Bay*, 299 Mich App 504, 509; 831 NW2d 881 (2013).

B. STATUTORY CLAIM

We shall first address the parties' arguments concerning Spigner's statutory claims. On appeal, W&D Landscaping argues that the trial court erred when it denied W&D Landscaping's motion to dismiss Spigner's claim premised on a violation of MCL 559.241 and an underlying ordinance. W&D Landscaping maintains that this claim should have been dismissed because Spigner never pleaded it and the statute does not provide a private right of action. Similarly, on cross-appeal, the Association and Kramer-Triad argue the trial court should have dismissed Spigner's statutory claim because the statute and ordinance do not establish an actionable duty;

the violation of the statute and underlying ordinance would merely be evidence of negligence. They also contend that MCL 559.241 does not apply to condominium associations. Finally, the section of the maintenance code cited by Spigner, which was purportedly incorporated by the local ordinance, does not even apply to roads.

Before the trial court, Spigner maintained that she had a private right of action premised on a violation of MCL 559.241(1), which is part of the condominium act. See MCL 559.101 *et seq*. That statute requires "a condominium project" to "comply with applicable local law, ordinances, and regulations." MCL 559.241(1). Because Clinton Township has an ordinance that requires property owners to comply with the current International Property Maintenance Code (the Maintenance Code) published by Building Officials and Code Administrators International, Inc., see Clinton Township Ordinance, § 1496.01, it follows that the Association and Kramer-Triad had a duty under MCL 559.241(1) to maintain the common areas in compliance with the Maintenance Code.

Assuming that the Association and its management company constitute a condominium project within the meaning of MCL 559.104(1), and assuming further that MCL 559.241(1) establishes a private right of action for a violation of any local ordinance that results in injury to a third party,[1] Spigner nevertheless failed to establish that she had a viable claim under MCL 559.241(1). The section of the Maintenance Code upon which Spigner relies provides: "All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." Maintenance Code, § 302.3. It is undisputed that Spigner slipped and fell as a result of a hazard located on a road; she was not on a sidewalk, walkway, driveway, or parking space. Giving those terms their ordinary meaning, a roadway is not an area that is similar to any of those features. A road, even a private one, is a thoroughfare that is open to significantly more traffic than a parking space or driveway, will be wider, and is subject to higher traffic speeds. Thus, § 302.3 did not apply to the area at issue. Because Spigner failed to establish that the Association or Kramer-Triad violated a provision of any code adopted by reference in an ordinance, she necessarily failed to establish a violation of MCL 559.241(1). Consequently, the trial court should have dismissed Spigner's claim premised on a violation of MCL 559.241(1).

[1] That the Legislature has imposed a duty by statute does not automatically confer a right on the class of persons benefited by the statute to sue for violations; rather, the statute must contain either an express or implied private right of action. See *Office Planning Gp, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 496-500; 697 NW2d 871 (2005); *Pompey v Gen Motors Corp*, 385 Mich 537, 552 n 14, 552-553; 189 NW2d 243 (1971) (stating that the exclusive remedy for the violation of a statutorily imposed duty is the remedy provided in the statute for its violation except where there is no pre-existing common law remedy and the statute's remedy is plainly inadequate).

C. COMMON LAW PREMISES LIABILITY

In their appeals, W&D Landscaping, the Association, and Kramer-Triad each argue that the trial court additionally erred when it denied their motions to dismiss Spigner's premises liability claim under the open and obvious danger doctrine. They each maintain that the snow and ice at issue plainly constituted an open and obvious hazard with no special aspects. As such, under the open and obvious danger doctrine, the Association and Kramer-Triad had no duty to warn about or rectify the dangerous condition and Spigner's premises liability claim failed as a matter of law.

A premises possessor does not have a duty to rectify dangerous conditions on his or her premises if the conditions are so obvious that the premises possessor might reasonably expect his or her invitees to discover the condition and realize the danger. *Grandberry-Lovette*, 303 Mich App at 576. Under those circumstances, the open and obvious danger doctrine will cut off liability. *Id.* "A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection." *Id.* at 576-577 (quotation marks and citation omitted). Here, there is no dispute that an average user with ordinary intelligence acting under the same conditions as Spigner would have discovered the snow and ice at issue and realized the risk presented on casual inspection. As such, the open and obvious danger doctrine would normally bar Spigner's premises liability claim. *Id.* at 576. However, under Michigan's common law, a premises possessor may be liable for certain dangerous conditions, notwithstanding that they are open and obvious.

In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001), our Supreme Court recognized that a premises possessor still has a duty to "undertake reasonable precautions to protect" his or her invitees from open and obvious hazards if the otherwise open and obvious condition has "special aspects" that make "even an open and obvious risk unreasonably dangerous." The Court explained that, if there is evidence that the condition has special aspects that "differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm," the fact that the condition is open and obvious will not bar liability. *Id.* at 517-518. The Court gave two examples of conditions with special aspects: a hazardous condition (standing water) that is "effectively unavoidable" and a hazardous condition (a large open pit) that, although avoidable, presents such a "substantial risk of death or severe injury" that it would be unreasonable to maintain the condition absent warnings or other remedial measures. *Id.* at 518.

In the present case, the trial court determined that the open and obvious danger doctrine did not bar Spigner's claim because the danger posed by the snow and ice blocking Spigner's mailbox was effectively unavoidable. Our Supreme Court has acknowledged that a premises possessor may be liable for injuries caused by wintry conditions, even though the wintry conditions are open and obvious, if the conditions have special aspects that make them unreasonably dangerous. *Hoffner*, 492 Mich at 463-464. In considering whether a condition is effectively unavoidable, the Court clarified that an effectively unavoidable condition is a condition that is "unavoidable or inescapable *in effect* or *for all practical purposes*." *Id.* at 468. That is, in order to prove that a hazard is effectively unavoidable, the plaintiff must show that he or she, "for all practical purposes, [was] *required* or *compelled* to confront [the] dangerous

hazard." *Id.* at 469. If, however, the evidence shows that the plaintiff had "a *choice* whether to confront [the] hazard", the hazard was not truly unavoidable, "or even effectively so." *Id.*

Turning to the facts of its case, the Court in *Hoffner* determined that the ice blocking the entrance to a business was not effectively unavoidable. *Id.* at 469. The Court held that the unreasonableness of the hazard alone was the "touchstone for permitting recovery under the 'special aspects' exception to the open and obvious danger doctrine", and "[n]either possessing a right to use services, nor an invitee's subjective need or desire to use services, heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether to confront an obvious hazard." *Id.* at 471. Indeed, the Court emphasized, even the compulsion to confront a hazard as a requirement of employment is insufficient to establish that the hazard was effectively unavoidable. *Id.* at 471-472. In *Hoffner*, the plaintiff was not compelled to confront the icy entrance, she merely chose to do so "in order to take part in a recreational activity." *Id.* at 473. Because the plaintiff was not trapped in the building or otherwise compelled by extenuating circumstances to confront the ice, the ice was not effectively unavoidable. *Id.* Finally, because the plaintiff failed to present any evidence that the risk of harm posed by the ice was so high that it was otherwise inexcusable to permit the condition, the Court determined that there were no special aspects and the open and obvious danger doctrine barred the plaintiff's claim. *Id.* at 473-474.

The present case does not involve a mere subjective desire or need to use a particular service or frequent a business. Because mail often includes communications and items of significant import, persons have a unique need to retrieve their mail that cannot be equated with a simple desire to avail oneself of the services or products offered by a particular business. Rather, the need to retrieve one's mail is an "extenuating circumstance[]" that leaves one "with no choice but to" confront the risk posed by any hazard blocking access to the mail. Accordingly, under the facts of this case, we conclude that the trial court did not err when it determined that the hazard at issue was effectively unavoidable.

We reject W&D Landscaping's contention that, under the decision in *Hoffner*, Spigner had to establish that the hazard was *both* effectively unavoidable and inherently dangerous. This Court recently held that an effectively unavoidable hazardous condition remains unreasonable even though open and obvious because it gives rise to a unique likelihood of harm; for that reason, the plaintiff does not also have to show that the hazard involves a uniquely high severity of harm. *Attala v Orcutt*, ___ Mich App ___; ___ NW2d ___ (2014) (Docket No. 315630).

We also do not agree that the trial court abused its discretion when it granted Spigner's request for relief from the trial court's opinion and order entered on W&D Landscaping's motion for reconsideration. Although generally a trial court should only grant relief under MCR 2.612(C)(1) "when the circumstances are extraordinary and the failure to grant relief would result in substantial injustice," *Gillispie v Bd of Tenant Affairs of Detroit Housing Comm*, 145 Mich App 424, 428; 377 NW2d 864 (1985), the trial court nevertheless had the discretion to provide the requested relief. The trial court here concluded that it misapplied the decision in *Hoffner* to the facts of this case and, for that reason, erred when it dismissed Spigner's premises liability claim. It was, therefore, just for the court to correct the error without compelling the parties to endure the additional time and expense of an appeal. See *Heugel v Heugel*, 237 Mich App 471, 481; 603 NW2d 121 (1999) (stating that a trial court may grant relief under the court

rule when circumstances exist that persuade the court that an injustice would result if the request for relief is denied).

The trial court did not err when it refused to dismiss Spigner's premises liability claim as barred by the open and obvious danger doctrine.

III. THIRD-PARTY CLAIMS

A. STANDARD OF REVIEW

The Association and Kramer-Triad argue on cross-appeal that the trial court erred when it determined that there was a material question of fact as to whether W&D Landscaping had a duty to defend and indemnify the Association and Kramer-Triad against Spigner's claims and, on that basis, denied their motion for summary disposition. This Court reviews de novo the trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369. This Court also reviews de novo the proper interpretation of contracts. *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005).

B. ANALYSIS

In a contract titled "Snow Removal Operations Contract", W&D Landscaping agreed to perform various snow and ice removal services for the Association in exchange for compensation. In paragraph 2.2, it agreed to remove snow from, in relevant part, all streets and mailbox stands within the Association's complex. With regard to the mailbox stands, the parties agreed in paragraph 5.2.5 that the mailbox stands "shall be cleared" in order to provide access to the postal service: "Snow piled in front of mailbox stands must be removed to allow this access." Although W&D Landscaping offered salting and de-icing services, the Association did not ask that these services be performed on a regular basis. Rather, in paragraph 5.1, the parties agreed that such services would only be performed "as requested by the Association."

In addition to these general contract requirements, W&D Landscaping agreed to provide the Association with certain protections against harms that may arise from its performance under the contract. In paragraph 6.2.1, W&D Landscaping agreed, in relevant part, to carry a commercial general liability (CGL) insurance policy covering its work. It also agreed in paragraph 6.2.3 to list the Association and Kramer-Triad as additional named insureds under that policy. Finally, under paragraph 6.3, W&D Landscaping agreed to "indemnify, defend and save harmless" the Association and Kramer-Triad "against all claims or actions based upon, or arising out of, damage or injury," that was "caused by or sustained in connection with" W&D Landscaping's "performance" of the contract or caused by "conditions created" by its performance.

On appeal, the Association and Kramer-Triad contend that these indemnification provisions were triggered because Spigner's claims arose from a slip and fall in an area plowed by W&D Landscaping. However, a plain reading of the indemnification provision shows that a claim must be more than tangentially related to W&D Landscaping's performance under the contract in order to trigger the indemnification provision. W&D Landscaping only has a duty to defend and indemnify the Association and Kramer-Triad when there is a claim "based upon, or arising out of, damage or injury" that was "caused by or sustained in connection with" W&D

Landscaping's performance of the contract or caused by a condition that W&D Landscaping created through its performance of the contract. Thus, the mere fact that Spigner filed a claim for personal injuries that she suffered after falling in an area that W&D Landscaping agreed to plow was insufficient by itself to trigger the indemnification provision; there needed to be evidence that W&D Landscaping's performance (or failure to perform) had some causal relationship to Spigner's claim, either by directly causing the injury, by being the occasion for the injury, or by creating the condition that led to the injury, before W&D Landscaping would have an obligation to defend and indemnify.

Here, Spigner testified that she fell after she slipped on some ice in front of her mailbox. There was, however, no evidence that the Association requested W&D Landscaping to salt or otherwise de-ice the areas in front of the mailbox stands. Therefore, on this evidence, a reasonable jury could conclude that W&D Landscaping's performance of its snow removal services had no causal relationship to Spigner's injuries. And, if the jury made that finding, W&D Landscaping would have no obligation to defend or indemnify the Association or Kramer-Triad.

On the other hand, there was evidence from which a reasonable jury could conclude that W&D Landscaping failed to clear the snow from the mailbox stand at issue sufficient to provide access to the postal service and that this failure had a causal relationship to Spigner's injuries. Spigner's boyfriend testified that there was a bank of snow obstructing the mailbox such that he could not have driven close enough to the mailbox to allow access. Consistent with that testimony, Spigner testified that she had to lean toward the mailbox in order to open it and retrieve her mail. From this, a reasonable jury could find that Spigner could have safely accessed the mailbox from the Jeep had it not been for W&D Landscaping's failure to properly clear the snow from the mailboxes. That is, it could find that the failure to clear the mailboxes caused Spigner to try and access her mailbox on foot, which in turn led to her slip and fall.

In addition, although it appears that W&D Landscaping plainly breached its contractual obligation to add the Association and Kramer-Triad as additional named insureds under its CGL policy, in order to be entitled to recover for this breach, the Association and Kramer-Triad would have to show that, had W&D Landscaping included them as additional named insureds, W&D Landscaping's insurer would have provided them with a defense under the facts present in this case. Because the Association and W&D Landscaping did not present or discuss evidence that might establish this fact, they failed to establish that they were entitled to judgment as a matter of law on this claim. *Barnard Mfg*, 285 Mich App at 370.

There was a question of fact as to whether W&D Landscaping's performance of the snow removal contract had a causal relationship to Spigner's claims; therefore, the trial court did not err when it concluded that there was a question of fact as to whether W&D Landscaping had to defend and indemnify the Association and Kramer Triad. Similarly, because the Association and W&D Landscaping did not present evidence to establish that, but for W&D Landscaping's failure to name them as additional insureds under its CGL policy, W&D Landscaping's insurer would have provided them with a defense, the trial court did not err when it denied their motion for summary disposition on their breach of the contractual obligation to name them as additional insureds. See *Chelsea Investment Gp, LLC v City of Chelsea*, 288 Mich App 239, 254; 792

NW2d 781 (2010) ("To recover in a breach of contract action, a plaintiff must prove that the defendant's breach was the proximate cause of the harm the plaintiff suffered.").

The trial court did not err when it denied the Association and Kramer-Triad's motion for summary disposition on their third-party claims.

IV. CONCLUSION

The trial court erred when it determined that Spigner raised a viable claim for damages premised on a breach of MCL 559.241. Because the underlying ordinance did not apply to roads, the trial court should have dismissed that claim. The trial court did not, however, err when it determined that Spigner's premises liability claim was not barred by the open and obvious danger doctrine because the hazard at issue was effectively unavoidable. The trial court also did not err when it denied the Association and Kramer-Triad's motion for summary disposition of their third-party claims against W&D Landscaping. Accordingly, we reverse and vacate that part of the trial court's order denying the motion for summary disposition as to Spigner's claim under MCL 559.241, and remand for entry of an order dismissing Spigner's statutory claim. In all other respects, we affirm the trial court's orders.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, we order that none may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Michael J. Kelly

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K. F. KELLY, J. (*concurring in part and dissenting in part*).

I agree with the majority that the trial court erred when it determined that Spigner raised a viable claim for damages premised on a breach of MCL 559.241. However, because the condition in this case was open and obvious and there were no special aspects rendering the condition unreasonably dangerous, I would reverse and order that the trial court enter summary disposition in favor of W & D Landscaping.

A property owner has a duty to exercise reasonable care to protect its invitees from an unreasonable risk of harm that is caused by a dangerous condition on the property. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, an owner generally does not have a duty to protect invitees from open and obvious dangers. *Id*. A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002) (internal citation marks omitted). "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Royce v Chatwell Club Apartments*, 276 Mich App 389,

392; 740 NW2d 547 (2007). Where there is snow on a sidewalk or parking lot, its potential slipperiness is open and obvious as a matter of law. *Id*. at 394.

Nevertheless, even if a danger is open and obvious, an owner has a duty to take reasonable precautions to protect its invitees if special aspects of a condition render it unreasonably dangerous. *Lugo, supra* 464 Mich 517. The issue in this case is whether the condition presented special aspects that rendered it unreasonably dangerous. An unreasonably dangerous condition may exist because it is "effectively unavoidable" or "impose[s] a high risk of severe harm." *Lugo, supra* 464 Mich at 518. The *Lugo* Court explained:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.

In *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), our Supreme Court further examined what is meant by "effectively unavoidable." In that case, the plaintiff was injured when she slipped and fell on ice as she entered a health club facility. The facility had just one entrance, and the plaintiff recognized the danger posed by the icy sidewalk leading to that entrance. She chose to walk on the ice to enter the facility and work out, and while doing so, she slipped and fell, injuring her back. *Hoffner, supra* 492 Mich at 456-457.

The Court considered the "special aspects" exception to the open and obvious danger doctrine. It explained that "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 468-469 (emphasis in original). It further instructed that the touchstone for permitting recovery under this exception is the unreasonableness of the hazard. *Id*. at 471.

The Court explained that

> exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations. Thus, an "unreasonably dangerous" hazard must be just that—not just a dangerous hazard,

> but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances. An "effectively unavoidable" hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a "special aspect" characterized by its *unreasonable risk of harm*. [*Id*. at 472-473 (emphasis in original) footnotes omitted.]

The majority concludes that Spigner, in seeking to retrieve her mail, was required to confront the condition, rendering the hazard effectively unavoidable. I disagree. Spigner does not make a compelling argument that she was "forced to confront the risk," or " 'trapped' in the building," or "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Hoffner*, 492 Mich at 473. Moreover, the mailbox was obviously accessible by a motor vehicle as can clearly be seen in the photographs of the mailbox.[1]

In *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2004), the plaintiff was injured when she slipped and fell on an icy sidewalk while attempting to remove personal items from a private home where she was previously employed as a caregiver. *Id*. at 233. The Court determined that the icy conditions were not unavoidable because the plaintiff could have removed her items another day, she was not "effectively trapped inside a building" such that she had to encounter the open and obvious condition in order to get out, and she admitted that she had "walked around the regular pathway to avoid the slippery condition." *Id*. at 242.

In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002), the plaintiff was injured when he slipped and fell on icy steps as he was going into his college dormitory. *Id*. at 2. This Court concluded that the icy condition was not unavoidable because the plaintiff had admitted that he saw the snow and ice buildup on the steps and knew that there was an alternative entry nearby. *Id*. at 6.

And in *Kenny v Kaatz Funeral Home Inc*, 472 Mich 929, 697 NW2d 526 (2005), the Supreme Court, "in lieu of granting leave to appeal," reversed this Court's decision for the reasons stated in the dissent. In that case, plaintiff fell while traversing the defendant's snow-covered parking lot to gain access to the defendant's place of business. The dissent concluded that "[s]now and ice in a Michigan parking lot on December 27 are common, not unique, occurrence[s]" and that a snow-covered parking lot was not the type of unique situation that fell within the special aspects exception. *Kenny*, 264 Mich App 99, 121; 689 NW2d 737 (2004) (Griffin, J., dissenting).

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[1] The photographs show both older tire tracks and fresh, crisp tire tracks accessing the mailbox. However, plaintiff chose not to drive up to the mailbox to retrieve her mail, nor did she even try to do so, but rather disregarded the option and chose to access the mailbox on foot.

The wintery conditions that Spigner encountered did not give rise to a special aspect exception because she chose to confront the hazard. Moreover, there is no evidence that the condition at issue here gave rise to a uniquely high severity of harm. Our Supreme Court has cautioned:

> In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition a priori, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous. Thus, . . . this opinion does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented. [*Lugo*, 464 Mich at 519 n 2.]

There is nothing in the record to suggest that Spigner confronted "anything other than what every Michigan citizen is compelled to confront countless times every winter." *Hoffner*, 492 Mich at 480.

I would reverse.

/s/ Kirsten Frank Kelly