STATE OF MICHIGAN
IN THE SUPREME COURT

DENISE FOWLER, as next friend of
VIRGINIA JANE RAWLUSZKI,
Plaintiff/Appellee,

v.

MENARD, INC,
Defendant/Appellant

and

DALE PAUL VAN WERT and
LISA GINGERICH,
Defendant
_____/

Supreme Court Case No: 152519
Court of Appeals Case No: 310890
Bay County Circuit Case No: 11-3317-NO

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SUPPLEMENTAL BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL
TO THE MICHIGAN SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF QUESTION PRESENTED
BY ORDER OF THE SUPREME COURT

I. Whether the crosswalk installed by the defendant had a special aspect that could create liability for even an open and obvious hazard, and whether such a special aspect can exist if the condition is not unreasonably dangerous.

Appellant says: The crosswalk has a special aspect, and a special aspect can exist even if the condition is not unreasonably dangerous.

SUPPLEMENTAL ARGUMENT

Contrary to Menard's arguments, this is not a parking lot case. It is a crosswalk case. Virginia Rawluszki utilized a feature installed by Menard that was supposed to be for her safety. The design failed to meet the basic of industry standards. This made the crosswalk in Menard's parking lot "unusual," which caused death. Unlike other cases dealing with the special aspect doctrine, the crosswalk is not a naturally occurring aspect of living "above the 42nd parallel" or simply a pothole in a parking lot. Instead, it is a special aspect, purposely and negligently installed by Menard, contrary to the industry standards. As such, this condition takes this case out of the doctrine of open and obvious. But even if it is open and obvious, the special aspect doctrine will, potentially, impose liability by a Bay County jury. By marking off the crosswalk with yellow cross hatching, Menard had, in effect, said "sure, come ahead, you will be safe here." Ms. Rawluszki did so, at her personal peril. This Court is requested to deny the Application in full.

FACTS[1]

Denise Fowler is next friend and the daughter of Virginia Jane Rawluszki (the decedent) in this premises liability action against defendant Menard, Inc. Decedent was struck by a motor vehicle as she walked within the crosswalk from the defendant's store to the defendant's parking lot. The crosswalk did not have signs posted, as is the standard in the industry. Menard created the crosswalk with the intent to draw pedestrian traffic from its exit. **Exhibit A**. Decedent suffered a brain injury that eventually led to her death. Prior to her passing, she filed her original complaint on May

[1] The facts are largely not in dispute. These cases were largely derived from the Court of Appeals' decision following remand. *Fowler v Menard, Inc (On Remand)*, unpublished decision of the Court of Appeals, issued Sept 15, 2015 (Docket No. 310890).

3, 2011, against the driver of the vehicle that struck her and against Menard as landowner/premises possessor. Plaintiff asserted that the crosswalk created a feigned zone of safety and that Menard had a duty to take industry-standard measures to install signage and/or traffic signals to warn oncoming vehicles of the pedestrian crossing or to warn pedestrians of possible non-stopping vehicle traffic.

Menard filed its motion for summary disposition arguing that the crosswalk, as part of its parking lot, was an open and obvious condition such that a pedestrian could anticipate the danger of vehicles driving through, relying heavily on *Richardson v Rockwood Center, LLC*, 275 Mich App 244; 737 NW2d 801 (2007). Menard did not challenge the conclusions within the report of accident reconstruction expert Donald E. Smith, Jr., who concluded—

> the design of the crosswalks at this Menards are substandard for safety. . . . There are no warning signs, no pedestrian crosswalk warning signs or any type of signage. The combination of these design problems creates an unreasonable risk to pedestrians.

Exhibit B attached to *Plaintiff Virginia Rawluszki's Response to Defendant Menard's Motion for Summary Disposition,* dated Feb 23, 2012; see also *Fowler (On Remand)*, *supra*, slip op at *2. The Court of Appeals confirmed that "the pictorial evidence was consistent with the uncontested description of the crosswalk as being unmarked and in proximity to the entry and exit doors" and that Plaintiff "offered certain industry standard documents and publications from the Michigan Secretary of State." *Id*.

The trial court merely denied summary disposition to Menard.[2] The trial court denied defendant's motion, reasoning that while parking lot dangers were open and obvious there was a question of fact as to whether the crosswalk, as designed, created a special aspect that gave rise to a duty on the part of defendant as the premises owner.

After the Court of Appeals initially refused to grant interlocutory leave, this Court remanded the case as if on leave granted with no instructions. *Fowler v Menard, Inc*, unpublished order of the Court of Appeals, entered May 16, 2013 (Docket No. 310890); *Fowler ex rel Rawluszki v Menard, Inc*, 495 Mich 897; 839 NW2d 205 (2013). The Court of Appeals, on remand, affirmed the trial court's pre-trial denial of summary disposition. Menard again sought leave with this Court. This Court scheduled oral argument on the *Application* and asked the parties to brief two issues not specifically raised by Menard in its *Application*:

> Whether the crosswalk installed by the defendant had a special aspect that could create liability for even an open and obvious hazard, and whether such a special aspect can exist if the condition is not unreasonably dangerous.

Fowler v Menard, Inc, __ Mich __; 877 NW2d 873 (2016).

ARGUMENT

I. An invitee is entitled to the highest non-compromised level of protection under premises liability law.

A premises possessor or owner generally 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; 629

[2] To be clear, procedurally, the trial court did not rule that the lack of signage *is* a special aspect. The trial court properly left that disputed issue to the jury, which Menard has the ability, still today, to make its arguments towards.

NW2d 384 (2001)(citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995)). However, where the dangers are 1.) known to the invitee[3] or 2.) are so obvious that the invitee might reasonably be expected to discover them, a premises possessor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee, and the premise possessor's duty does not generally encompass removal of open and obvious dangers. *Lugo, supra*, at 516. However, this legal supposition is contrasted against the well-established premises rule that "an invitee is entitled to *the highest* level of protection under premises liability law." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000) (citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 256; 235 NW2d 732 (1975)). The premise possessor's duty is to protect invitees from *unreasonable* risks of harm. *Lugo, supra*, at 517. "[T]here may be special aspects of [an installed feature] 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, supra*, at 614. The question becomes, what must the plaintiff provide to show a "special aspect" to survive summary disposition?

II. The separation of open and obvious versus a special aspect is not clearly enumerated under Michigan law.

What is open and obvious versus a special aspect under Michigan law is largely a matter of degree and lacking any bright line test. In *Maurer v Oakland Co Parks & Recreation Dep't*, one of the two consolidated cases decided by this Court in *Bertrand*, the plaintiff slipped and fell on an "unmarked cement step" as she was leaving a rest

[3] Menard has only challenged on the second prong of open and obvious doctrine, and has not alleged that Rawluszki, now deceased, had knowledge of the danger contained within Menard's faulty crosswalk.

room area at a park. This Court explained that the premises possessor was entitled to summary disposition on the basis of the open and obvious danger doctrine because the plaintiff had not shown anything "unusual" about the step—it was just that the plaintiff did not see it. *Bertrand, supra*, at 620. *Lugo*, in discussing *Maurer* (within *Bertrand*), further clarified that the important legal point is the plaintiff in *Maurer* offered nothing to distinguish the steps at issue from ordinary steps in terms of the danger that they presented. *Lugo, supra*, at 522 fn5. By way of further example, the *Lugo* Court hypothesized that an "ordinary pothole" in a parking lot is open and obvious while a "thirty foot deep pit in the middle of a parking lot" is a special aspect removing the open and obvious aspect.[4] Yet both are holes in a parking lot.

Therefore, the differentiation between an open and obvious danger and special aspect danger is whether a plaintiff can show something "unusual" or otherwise non-typical about the faulty premises when compared to the conditions of a normal premises. In other words, the legal question for the court, at the time of summary disposition, is whether there is a material question of fact of whether plaintiff can show something "unusual" about the faulty premises to warrant presentation of the dispute to the jury. If so, it is a question for the jury. *Hoffner v Lanctoe*, 492 Mich 450, 476; 821 NW2d 88 (2012) ("it is only when an open and obvious hazard is in some manner *unreasonable* that there is a question of fact for the jury." emphasis in original). This Court expounded this very standard in *Hoffner* in applying *Lugo*—

> It is worth noting *Lugo*'s emphasis on the narrow nature of the "special aspects" exception to the open and obvious doctrine. Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is

[4] This is somewhat curious because one would think a thirty-foot deep pit would be more observable in a parking lot than a small, ankle-twisting pothole.

> "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." The touchstone of the duty imposed on a premises owner being reasonableness, this narrow "special aspects" exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature.[5]

Hoffner, *supra*, at 462. On the other hand, "the *degree* of potential harm is relevant to whether the risk of harm posed by a condition remains unreasonable despite its obviousness." *Lugo, supra*, at 522 fn5.

III. The crosswalk has an unusual, special aspect not seen in typical commercial crosswalks—the lack of industry-standard signage and visual notification to pedestrians and automobiles drivers.

In opposition to the motion for summary disposition, Plaintiff offered that an "unusual" aspect exists in this case—an unreasonably faulty crosswalk not meeting the standards in the industry. This case involves an unreasonable safe *crosswalk*, not an unreasonably safe *parking lot*. As depicted in the photograph submitted to the trial court, Menard has installed a yellow hatch-marked designated area for invitees to cross into and reach the parking lot. The crosswalk contains no signage. Yet, Menard had its store set-up in such a way as to direct these invitees to use a ***specific*** exit door to use this specific crosswalk when exiting from the store to the parking lot.

[5] To answer the Court's first question, a special aspect could create liability for even an adjudicated open and obvious hazard. *Hoffner* confirms it. Moreover, *Lugo* suggests it too as an ordinary pothole is open and obvious but a thirty-foot pit is a special aspect despite the latter, being so large, is likely being readily visible. In short, a pothole is expected or usual; a 30-foot pit is not.

In the trial court, numerous examples of other local commercial enterprises show and provide what the industry-standard (or "the usual") is for proper signage to direct either vehicle traffic, pedestrians, or both.

Additionally, Plaintiff below presented to the trial court the unrebutted report of her expert who explained the various industry standards[6] direct that "well planned design is a part of pedestrian safety" for the design and installation of devices for pedestrian and vehicle traffic in commercial enterprises. Plaintiff's expert concluded and would be prepared to testify to the jury (which went unrebutted or unchallenged by Menards) that "it is essential to plan for navigation into, out of and through a parking facility, *from the perspective of both the pedestrian and automobiles*" and that "[t]he combination of these design problems [at his Menard store] creates an *unreasonable risk to pedestrians*."[7] Exhibit B attached to *Plaintiff Virginia Rawluszki's Response to*

[6] Plaintiff's expert refers to standards explained by The Urban Land Institute, the American Association of State and Highway Transportation Officials, and the National Parking Association. Exhibit B attached to *Plaintiff Virginia Rawluszki's Response to Defendant Menard's Motion for Summary Disposition,* dated Feb 23, 2012. These were not challenged by Menard before the trial court.

[7] For the Court's second question, the Court inquired whether a special aspect could exist if the condition is not unreasonably dangerous. This case is not those circumstances. Plaintiff has provided unrebutted expert testimony that the crosswalk is an unreasonable risk (i.e. is dangerous) to pedestrians. As such, at this stage of the proceedings (i.e. pre-trial summary disposition stage which is viewed in the

Defendant Menard's Motion for Summary Disposition, dated Feb 23, 2012 (emphasis added). At minimum, this creates a material question of fact for the jury to decide if a special aspect exists in this case, and thus the trial court properly denied summary disposition to Menard. See *Hoffner, supra*, at 476 ("it is only when an open and obvious hazard is in some manner *unreasonable* that there is a question of fact for the jury." emphasis in original). Thusly, here, Menard's crosswalk *unreasonably* lacks this usual[8] feature.

The crosswalk installed and maintained by Menard lacks the "usual," typical, and normal safety features essential for a crosswalk—signage and notifications. Menard created this apparent "safe zone" for its invitees and this zone was substandard by lacking requisite warning to the oncoming traffic and/or departing pedestrians. As such, the crosswalk installed by Menard has a special aspect—being unusually substandard from the industry standards—that creates liability (or at least a material question of fact for the jury) for the premises possessor who owes highest level of protection under premises liability law. As these facts show, the objective and subjective degree of harm in not having a properly constituted crosswalk is extremely high and deadly, as the victim of this case suffered a brain injury eventually leading to her death. *Fowler (On Remand)*, *supra*, at *1. Therefore, as explained by *Hoffner*, when a plaintiff demonstrates that a special aspect exists or that there is a genuine issue of material

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light most favorable to Plaintiff, see *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994)), it cannot be presumed or adjudicated that the crosswalk is not unreasonably dangerous.

[8] This standard makes sense because when a person is on the lookout (or should be on the lookout) for dangers that are open and obvious, it must be reasonably foreseeable that a danger exists, i.e. snow or ice in a Michigan winter. Under normal industry practices, it is typical for a shopper exiting a store to proceed unless a sign announces otherwise. Menard's lack of signage gives shoppers and vehicle drivers the unreasonable feeling of a safety zone where no precaution is needed, as in a normal big-box store setup. See *supra*, at 7-8 (photos of other stores).

fact regarding whether a special aspect exists, tort recovery is permitted if the defendant breaches his duty of reasonable care. *Hoffner, supra,* at 463. Two material questions of fact remain: 1) whether this crosswalk was installed in a manner that increased the risk to the pedestrian, and if so, 2) whether the crosswalk installation was a proximate cause of decedent's injury. These questions are properly put to the *Fowler* jury.

The factual circumstances in this cases cited by this Court in its April 29, 2016 order, *Lugo* and *Hoffner*, neither pled nor offered a material question of fact there was something "unusual" to warrant a special aspect or a material question of fact about a special aspect. As such, the courts there must order summary disposition in favor of the premises owners. Here, at this summary disposition-staged case, Plaintiff has alleged a special aspect—something "unusual" or "unreasonable" in light of industry standards—in Menard's crosswalk, and this is a proper question for the jury. *Hoffner, supra,* at 476.

IV. *Richardson* is not applicable.

Menards, by its application and below, argued *Richardson*,[9] resolves this case. As argued by Plaintiff below, it does not. In *Richardson*, the plaintiff did not plead anything "unusual" about the parking lot in which plaintiff was struck, which is different from this case where a crosswalk was pled have an unusual special aspect. As such, *Richardson* is inapplicable to the claim at hand.[10]

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[9] *Richardson v Rockwood Center, LLC*, 275 Mich App 244; 737 NW2d 801 (2007).

[10] Michigan has not had to deal with the issue of the interaction premises liability and crosswalks. However, two sister state courts have, with both rejecting the open and obvious doctrine and the specific layout of the parking was considered. *Poloski v Walmart Stores, Inc*, 68 SW3d 445 (Mo App 2001) and *Bangert v Wal-Mart Stores Inc*, 295 Ill App 3d 418; 695 NE2d 57 (1998).

A. Menards only limited its appeal to the non-application of *Richardson* and thus a challenge to the standing law is not before this Court.

Problematic for Menards, its aggressive appeal of the denial of the motion for summary disposition was solely premised on its argument that *Richardson* "is right on point." See e.g. **Transcript, Apr 4, 2012, at p. 5**; see also *Fowler (On Remand), supra,* at *3. Menards did not, by its *Application for Leave*, raise the questions made by this Court via its April 29, 2016 order. Because Menards did not raise them, such issues are not generally before this Court. See MCR 7.305(H)(4)(a). The *Application for Leave* only sought to challenge the trial court's decision on the basis of non-application of *Richardson*. As such, this *Application for Leave* is a poor candidate to challenge the issues seemingly being pressed into contention by this Court's April 29, 2016 order and for its continued consideration of this appeal. And this case is an equally poor candidate as an interlocutory appeal, presented without a jury determination, as to whether, factually, it concludes whether there is a special aspect or not. See *Studley v Hill Twp*, 488 Mich 988; 791 NW2d 121 (2010) (YOUNG, CJ, concurring) ("This case comes to us on an interlocutory appeal, and the defendants have not shown that their rights will be *irreparably* damaged by the failure of this Court to intervene at this time." emphasis in original).

RELIEF REQUESTED

For the reasons cited herein, Appellee requests this Court to deny the *Application for Leave* and remand this case for trial.

RESPECTFULLY SUBMITTED:

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