# STATE OF MICHIGAN

# COURT OF APPEALS

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| ANGELA M. SABATOS,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>July 9, 2013 |
| v | No. 302644<br>Alger Circuit Court |
| CHERRYWOOD LODGE, INC.,<br><br>Defendant-Appellee. | LC No. 2010-005008-NO |

ON REMAND

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

This case arising from a slip and fall in an icy parking lot returns to us on remand from our Supreme Court. In our prior opinion we determined that, although the icy parking lot at issue presented an open and obvious hazard, because plaintiff Angela M. Sabatos could not leave defendant Cherrywood Lodge, Inc.'s (the Lodge) premises without encountering the icy parking lot, the hazard was effectively unavoidable. *Sabatos v Cherrywood Lodge, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 2012 (Docket No. 302644), slip op at 2-3. As such, we concluded that the open and obvious danger doctrine did not relieve the Lodge of its duty to protect its invitees from unreasonable dangers. *Id.* at 3. In reaching this determination, we primarily relied on our Supreme Court's decision in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), but we also cited two opinions where this Court applied *Lugo* to unavoidable icy conditions: *Hoffner v Lanctoe*, 290 Mich App 449; 802 NW2d 648 (2010) (*Hoffner I*) and *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005). *Sabatos*, slip op at 2.

*Robertson* and *Hoffner I* involved invitees who arrived at the premises possessor's property and found their way into the businesses blocked by icy conditions. In both cases, the invitees could have avoided the hazardous condition by refusing to patronize the businesses. Despite these facts, this Court applied *Lugo* and determined that the conditions were effectively unavoidable because the invitees could not patronize the businesses without encountering the hazards. See *Hoffner I*, 290 Mich app at 461-464 and *Robertson*, 268 Mich App at 593-595.

At around the time we released our prior opinion, our Supreme Court issued its decision on appeal in the *Hoffner* case. See *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012) (*Hoffner II*). The Court in *Hoffner II* reaffirmed that a premises possessor has no duty to warn about or rectify a condition that is open and obvious unless the danger posed by the open and obvious hazard is unreasonably dangerous or effectively unavoidable. *Id.* at 462-463. The Court explained that a hazard is effectively unavoidable when the invitee is required or compelled to encounter it:

> Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*. Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so. [*Id.* at 468-469.]

The Court further stated that an invitee's desire to visit a premises possessor's business—however strongly felt—is not sufficient to satisfy the requirement that the invitee must be required or compelled to encounter the hazard before it will be deemed effectively unavoidable. *Id.* at 469-473. Because the plaintiff in the *Hoffner* cases "was not 'trapped' in the building or compelled by extenuating circumstances" to encounter the icy condition, the Court concluded that the condition was not effectively unavoidable and, for that reason, the plaintiff's claim was "precluded" under the open and obvious danger doctrine. *Id.* at 473-474. In reaching its decision, our Supreme Court specifically rejected this Court's application of *Lugo* to the facts in *Hoffner I* and *Robertson*. *Id.* at 472, 482.

After our Supreme Court's decision in *Hoffner II*, the Lodge moved for reconsideration in light of that decision. Although we did not state the reasons, we denied reconsideration because the facts in this case were significantly different from those in the *Hoffner* case and our Supreme Court's decision in *Hoffner II* did not appear to alter the basic analysis as it would apply here. The Lodge then appealed to our Supreme Court and it vacated our judgment and remanded the case back to this Court "as on reconsideration granted" in light of its decision in *Hoffner II*. *Sabatos v Cherrywood Lodge, Inc*, 493 Mich 972 (2013).

On reconsideration, we again conclude—for the same reasons—that the trial court erred when it determined that the Lodge had no duty to Sabatos under the open and obvious danger doctrine. Here, the evidence showed that Sabatos was effectively trapped within the Lodge's premises, which was the precise circumstance given by our Supreme Court in *Hoffner II* as an example of an effectively unavoidable condition. See *Hoffner II*, 492 Mich at 473. Moreover, we again reject the notion that Sabatos could have avoided the icy condition by clearing it herself or arranging for alternative transportation. In *Hoffner II*, our Supreme Court did not state that whenever an invitee has a choice to encounter a hazard, however extreme the options might be, the existence of that choice renders the hazard avoidable as a matter of law. Instead, it stated that the hazard must be unavoidable for all *practical purposes*. *Id.* at 472 ("An 'effectively unavoidable' hazard must truly be, for all practical purposes, one that a person is required to

confront under the circumstances."). In this case, the evidence showed there was no practical way for a visitor to leave the Lodge's business without encountering the icy parking lot. Because the ice was effectively unavoidable, the open and obvious danger doctrine did not apply to preclude liability. *Lugo*, 464 Mich at 518-519.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly