ORIGINAL

Ohio Supreme Court Case No. 2012-0514

IN THE SUPREME COURT OF OHIO

DORIS & BART PRAGNELL
Appellants

v.

EDWARD R. HART COMPANY, *et al.*
Appellees

On Appeal from the Fifth Appellate District, Stark County, Ohio
Appellate Case No. 2011 CA 00111

Memorandum in Response to Appellants' Memorandum in Support of Jurisdiction

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EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Appellants ask this Court to reiterate the standard set forth in Civ. R. 56 to ensure its proper application in lower level Ohio courts. Appellants have failed to demonstrate, however, the need for such reiteration under the facts of this case or otherwise. Appellants have not shown that there was a misapplication of the summary judgment standard in the present case, nor have they established a common trend of misapplication of the standard throughout Ohio. Jurisdiction over this appeal should therefore be denied, as Appellants have not established this case as one of public or great general interest to the citizens of the State of Ohio.

Appellants argue that this case "involves a situation where the plaintiff's testimony may be interpreted in a number of ways," and thus, summary judgment was inappropriate. The factual scenario presented, however, is representative of the standard, garden-variety premise liability cases routinely decided by lower level courts in Ohio. The trial and appellate courts approached the evidence and testimony in this matter with knowledge and familiarity of the applicable law, and experience deciding similar disputes at the summary judgment phase. With this background, both courts came to the same conclusion: that the testimony of Appellant is subject to only one interpretation, and that interpretation does not support a finding of liability against Appellee Edward R. Hart Co. Neither the trial court nor the appellate court even hinted that there could be another interpretation of the Appellant's discovery deposition testimony.

The Ohio Rules of Civil Procedure, as modeled after the Federal Rules, are designed to ensure the just, speedy, and inexpensive determination of every action. Rule 56 must be construed in a way that not only protects the rights of the persons asserting a claim, but also for the rights of persons opposing such claims to demonstrate that the claims have no factual basis.

Review of this matter by this Court is unnecessary to ensure proper application of Rule 56. Much to the contrary, acceptance of this appeal will have a chilling effect on the use of summary judgment to dispose of claims with no factual basis to support a finding of liability. Such a result discourages judicial economy and runs afoul of the policies and goals of the Ohio Rules of Civil Procedure.

STATEMENT OF THE CASE AND FACTS

On April 22, 2010, Appellant Doris Pragnell and her husband, Appellant Bart Pragnell, went to the Appellee Edward R. Hart Co.'s place of business to look at carpeting samples. Appellants arrived at Hart Company's facility around lunchtime. The weather was nice. The pavement was dry. To enter the showroom, Appellants had to walk up one single step before encountering the doorway. A black rubber mat sits on this step outside of the showroom. Mr. Pragnell proceeded up the step first. He opened the door of the building and walked into the showroom. Mrs. Pragnell followed her husband up the step, through the door, and into the building with no difficulties.

Appellants were inside the showroom approximately 30 minutes before leaving. Upon exit, Mr. Pragnell opened the exact door through which the couple entered the showroom, and Mrs. Pragnell walked out first in front of him. Mrs. Pragnell testified that the single step she used to enter Hart Company's showroom had not changed in any way during the 30 minutes she was inside the showroom. She stepped out with her right foot first, which landed on the step with no difficulties. Mrs. Pragnell then put her left foot down onto the step, again with no problem. At this point, Mrs. Pragnell was firmly planted on the step with both feet.

From the step she was on, Mrs. Pragnell needed to take one step down onto the sidewalk before she could begin walking. Instead, Mrs. Pragnell testified that she forgot about the

presence of the step and began walking as if she was on the sidewalk, causing her to fall. Mrs. Pragnell described how she fell during her deposition:

> Q: Right leg goes up. You intended for your right foot to land on the sidewalk, but instead it lands on the step?
>
> **A: I was on the step with both feet thinking that I was on the sidewalk because I stepped out of the building and started to walk, right foot first and fell to the ground.**
>
> Q: Did you forget the step was there?
>
> **A: Yes, I did.**

At no point during her deposition, over the course of at least a dozen questions specifically aimed at understanding how she fell, did Mrs. Pragnell state that her fall was caused by the placement of the black mat on the step. In fact, Mrs. Pragnell affirmatively stated that she does not recall whether the mat was even present on the day of her fall. Instead, Mrs. Pragnell's testimony is clear that she fell as a result of her own forgetfulness.

Appellants brought suit against the Edward R. Hart Company in the Stark County Court of Common Pleas and Hart Company filed its Motion for Summary Judgment shortly thereafter. Hart Company argued that the evidence and testimony given by Mrs. Pragnell did not support of a finding of a hazardous condition existing on Hart Company's premises, and that Mrs. Pragnell fell simply because she forgot about the presence of the step. It argued further that even assuming the step was hazardous to Mrs. Pragnell, which was expressly denied, Appellants were barred from recovery under the notice rule as set forth by this Court in *Raflo v. LoSantiville Country Club*, 34 Ohio St.2d 1, 295 N.E.2d 202 (1973) (finding that one who traverses a step upon entrance is charged with notice of a hazardous condition presented by the step upon exit).

In its Judgment Entry granting Hart Company's motion for summary judgment, the trial court found that there was no evidence of a hazardous condition presented by the step or the placement of the black mat thereon. The court therefore did not reach Hart's alternative argument. Of particular importance to the decision was the testimony of Mrs. Pragnell herself. The court noted that "[Mrs. Pragnell] never testified that the black mat visually impaired her ability to decipher whether or not she was on the sidewalk as she exited [Hart Company's] showroom. Rather, [Mrs. Pragnell] testified that she just thought she was on the sidewalk and forgot the step was there."

The Fifth District affirmed the trial court's grant of summary judgment in favor of Hart Company. The court found that there was not a hazardous condition on Hart Company's premises. It agreed with the trial court that Mrs. Pragnell's testimony is clear that Mrs. Pragnell's fall resulted solely from her forgetfulness. It held that when "viewing the evidence in a light most favorable to appellants, reasonable minds may only conclude that the black rubber mat did not create a hazardous condition and that appellee did not breach any duty in this case."

PROPOSITIONS OF LAW AND ARGUMENT

I. APPELLANTS' PROPOSITIONS OF LAW NOS. 1 AND 2

> When ruling on a motion for summary judgment, the evidence and stipulations must be viewed in a light most favorable to the party opposing the motion.
>
> Where evidence and testimony is [sic] capable of multiple interpretations, for the purposes of summary judgment, the interpretation ultimately given must be that most favorable to the party opposing the motion.

The foregoing Propositions of Law are nothing more than restatements of the well-established summary judgment standard as set forth by the Ohio Rules of Civil Procedure and as interpreted by this Court. *See Hounshell v. American States Insurance Company*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981) ("Where the...evidence or testimony is capable of multiple interpretations, summary judgment is [] inappropriate."). Hart Company is therefore in agreement with Appellants' statement of the black letter law in Ohio. It does not agree, however, that these standards were misapplied under the facts of this case.

II. THE TESTIMONY OF MRS. PRAGNELL, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO APPELLANTS, IS SUBJECT TO ONLY ONE INTERPRETATION AND THAT INTERPRETATION DOES NOT SUPPORT A FINDING OF A HAZARDOUS CONDITION ON HART COMPANY'S PREMISES.

The duty that operators of mercantile establishments owe towards their customers is one of ordinary care. *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, paragraph one of the syllabus, 49 N.E.2d 925 (1943). The owner of the premises must only maintain its premises in a reasonably safe condition, such that invitees will not unreasonably or unnecessarily be exposed to a dangerous condition. *Pashal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 203, 480 N. E.2d 474 (1985). Owners are not insurers of their customers' safety against all forms of accidents that may happen while on the premises. *Id.* at 204.

In the present case, the testimony of Mrs. Pragnell is subject to only one interpretation: that Mrs. Pragnell fell because she forgot about the presence of the step and not because of a hazardous condition existing on Hart Company's premises. Nothing in Mrs. Pragnell's deposition transcript tends to show that the step itself or the placement of the black mat thereon was hazardous to Mrs. Pragnell. Mrs. Pragnell was clear that she fell because she forgot about

the step – a step that she had successfully used to enter the building – and thought that she was on the sidewalk when she began to walk.

Appellants argue that a reasonable juror could find that Mrs. Pragnell did not fall because she forgot about the step, but rather, that she fell because unable to appreciate that she was on top of the step due to a visual obscurity created by the mat. With this argument, Appellants' counsel attempts to draw a distinction that his own client did not. Appellants argue that "[t]here is a reasonable inference that the lack of any visual cue, obscured by the mat, is what resulted in [Mrs. Pragnell's] belief that she was standing on the sidewalk." This argument, however, wholly ignores Mrs. Pragnell's testimony, wherein she explicitly stated why she fell – because she forgot the step was there. Further, Appellants failed to produce the testimony of an expert opining that the black mat created some kind of visual obstruction.

Not only did Mrs. Pragnell fail to testify as to a "visual obscurity" created by the mat, but Mrs. Pragnell could not even remember whether the black mat was present on the day of her fall. Although it is undisputed that the mat was present, Mrs. Pragnell's failed recollection is nevertheless important. If the black created an obscurity – an obscurity that, according to Appellants' counsel, caused Mrs. Pragnell to fall – it is likely that Mrs. Pragnell would have at least recalled that the mat was present on the day of her fall, and that she would have testified to that fact.

Appellants attempt to bolster their assertion of a "visual obscurity" with a picture of how the step and mat allegedly appeared to Mrs. Pragnell at the time of her fall. The picture of the mat provided by Appellants is misleading in a number of ways, and is not evidence that the step or the placement of the mat presented a hazardous condition. First, the picture is of low-quality and is in black and white and therefore denies this Court a reasonable opportunity to evaluate

whether the height difference between the step and the ground was actually obscured. Further, the picture is not taken from the vantage point of someone standing on top of the step – which is where Mrs. Pragnell was just before her fall. Instead, the picture is taken with the showroom door opened, from the hallway leading up to the step.

The lower courts came to the only conclusion available regarding Mrs. Pragnell's testimony: that the placement of the mat on the step had nothing to do with Mrs. Pragnell's fall. Mrs. Pragnell's statement that she forgot does not allow for the inference that she was physically unable to differentiate the step upon which she stood from the ground below. During her deposition, counsel for Appellee Hart Company asked Mrs. Pragnell at least a dozen questions specifically aimed at understanding how she fell. Not once did Mrs. Pragnell state – either directly or by implication – that the mat was hazardous to her in any way. Nothing in the record apart from the unsubstantiated allegations of Appellants' counsel, who is acting as both an advocate and expert witness, supports a finding of a hazardous condition, or that anything, other than Mrs. Pragnell's forgetfulness, contributed to her fall.

III. ANY ALLEGED DUTY HART COMPANY OWED TO MRS. PRAGNELL IS DISTINGUISHED UNDER *RAFLO,* AS THE STEP ON HART COMPANY'S PREMISES DID NOT CREATE AN UNREASOANBLY DANGEROUS CONDITION.

Defendant Hart cannot be liable under the holding in *Raflo* as Mrs. Pragnell is charged with knowledge of the step. 34 Ohio St.2d 1, 295 N.E.2d 202. In Ohio, an owner is liable to an invitee who, although using due care for her own safety, is injured by reason of an unsafe condition on the owner's premises, which is known to the owner but not to the invitee. *Englehardt v. Phillips*, 136 Ohio St. 73, paragraph three of the syllabus, 23 N.E.2d 829 (1939). The basis of such liability rests in the owner's superior knowledge of existing dangers or perils on the premises. *Id.* A business owner, therefore, will not be liable to an invitee for injuries

resulting from a hazard that the invitee has knowledge of, as the owner not does have superior knowledge of the hazard in such a situation. *See Raflo*. Additionally, a plaintiff is not excused from exercising her duty to avoid known dangers upon any theory of forgetfulness. *Id.* at 3.

In *Raflo*, the plaintiff attended a wedding and luncheon at the defendant's country club. *Id.* at 1. As she entered the door, she traversed an unusually high step. After the affair was over, she left the clubhouse the same as she went in and fell down the exact step she had previously traversed. The defendant's motion for summary judgment was granted and the appellate court affirmed. Upholding the decision of the two lower courts, this Court stated that "[o]ne who enters a building by traversing a step described as abnormally high, is charged with knowledge of the presence of that abnormality upon exiting." *Id.*

In the present case, Hart Company expressly denies the existence of a hazardous condition on its premises. Assuming, however, that the placement of the mat on the step created a hazard, Mrs. Pragnell is charged with knowledge of the hazard under *Raflo,* and therefore cannot hold Hart Company liable.[1] It is uncontested that Mrs. Pragnell exited Hart Company's showroom using the same door and step that she used to enter. It is uncontested that the step did not change during the 30 minutes that Mrs. Pragnell and her husband were inside the showroom.

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[1] Appellants incorrectly argue that *Raflo* is inapplicable to the facts of the present case because the step in *Raflo* was abnormally high. Essentially, their reading of *Raflo* suggests that the notice rule is only applicable in situations where there is something unique or eye-catching about a step that would actively put the plaintiff on notice of the step or a condition thereon. The inaccuracy of Plaintiffs' reading of *Raflo* is exhibited by the analysis and holding in *Leighton v. Hower Corp.*, 149 Ohio St. 72, 77 N.E.2d 600 (1948), which was cited by this Court in *Raflo* as the basis for its decision. There was nothing abnormal or distinct about the step in *Leighton* to actively put the plaintiff on notice of the step, yet the plaintiff in that case was in fact charged with notice. *See id.* In fact, the step in *Leighton* was exactly the same height as the step in the present case – approximately six and one-half inches high. *Id.* at 72. The *Raflo* Court did not limit, narrow, or draw exceptions for the "notice rule" as set forth in *Leighton*. Rather, it reaffirmed the rule, and additionally, clearly established that forgetfulness will not extinguish a plaintiff's responsibility to avoid known perils. *Raflo* 34 Ohio St.2d at 3, 295 N.E.2d 202.

Mrs. Pragnell is therefore chargeable as a matter of law with knowledge of the presence and condition of the step. Mrs. Pragnell's failure to avoid a known peril (Appellee denies the existence of any peril) negates any theory of liability of Hart Company with respect to the alleged hazard under *Raflo*. *See id.*

This Court in *Raflo* further explained that the doctrine of known peril cannot be overcome by classifying a defect as "insubstantial for the purpose of notice upon entering, but substantial for the purpose of imposing liability for a fall." *Id.* at 4 (rejecting plaintiff's argument that a defect, clearly and continuously visible upon entering, did not become apparent upon exiting until the plaintiff attempted to step down). Injuries occasioned by a condition that a plaintiff had notice of will be actionable only if circumstances render the condition unreasonably dangerous. *Id.*

Appellants cite *Casey v. Bob Evans Farms, Inc.*, 5th Dist. No. CA-4772, 1978 WL 217502 (March 8, 1978) as support for a finding of liability against Hart company. In *Casey*, the defendant was held liable to the plaintiff after she fell down a step upon exiting the defendant's building even though she had previously used the step to enter the building. *See id.* Appellants correctly state that the Fifth District found *Casey* to be factually distinct from *Raflo*. Appellants also correctly stated that the factual distinction was that the step in *Casey* was invisible from the vantage point of exiting customers. In *Raflo*, there was no allegation that the step became invisible to exiting customers.

This factual distinction should not, however, render *Raflo* inapplicable as suggested by Appellants. *Raflo* holds that plaintiffs are charged with notice of a step previously traversed and cannot hold a defendant liable for injuries occasioned by the step unless circumstances create a condition that is unreasonably dangerous. *See Raflo*, 34 Ohio St.2d at 4, 295 N.E.2d 202. The

factual distinction in *Casey* merely allowed the plaintiff to benefit from the exception set forth in *Raflo*. In *Casey*, the invisibility of the step to exiting customers created an unreasonably dangerous condition. *Casey* at *1 (holding that the step became unreasonably dangerous to exiting customers because its color, shade, and texture camouflaged it with the ground above and below). Thus, even though the plaintiff had previously traversed the step upon entering, she was able to hold the defendant liable because the step became "unreasonably dangerous" to her as an exiting customer because the step became invisible to her as she left the restaurant. *See id.*

The correct test for purposes of deciding the instant case, therefore, is not merely whether there was a change in appearance of the step upon exit, as suggested by Appellants. Obviously, any step looks different from the vantage point of someone approaching it to step up, as opposed to someone approaching it to step down. Instead, the correct test, as would be consistent with *Raflo* and *Casey*, is whether the appearance of the step upon exit created a condition that was unreasonably dangerous to the plaintiff. *See Raflo* at 4; *Casey* at *2.

Appellants allege that the placement of the black mat created a visual obscurity. Mrs. Pragnell has not, however, testified to this fact. Further, Plaintiffs have not alleged, assuming there was a visual obscurity, that the obscurity was unreasonably dangerous (as required to show liability under *Raflo* and *Casey*). Again, Mrs. Pragnell simply has not testified to the fact that she was unable to appreciate the height of the step due to the placement of the black mat. She has only testified that she fell off of the step because she forgot it was there. Appellants ask this Court to infer from Mrs. Pragnell's testimony that her fall was not caused by her forgetfulness, but that it was caused by her inability to appreciate the height of the step. This inference, however, does not flow from Mrs. Pragnell's testimony, nor does it flow from the physical evidence.

Appellants rely solely on their conclusory assertion that the present case is "factually the same as *Casey*" in arguing that the black mat created a dangerous condition. They do not point to any evidence in support. In *Casey*, the Fifth District held that reasonable minds could differ as to whether the step created an unreasonably dangerous condition. 1978 WL 2177502 at *1. In support of its holding, the Fifth District discussed the characteristics that made the step unreasonably dangerous. The step itself was "indiscernible because of the camouflaging effect and blending in of the identical color, shade and texture" of the step with the areas that were immediately above and below the step. *Id.* The grain of the concrete on all three surfaces (above, below, and on the step) ran in the same direction. *Id.* Additionally, a nearly 22-foot-wide concrete slab porch that plaintiff had to cross to get to the step after exiting through the door "gave the illusion of being one continuous piece of concrete with the sidewalk below, this illusion extending into the periphery." *Id.* These characteristic made the step invisible to someone exiting the defendant's restaurant.

The step under review in the instant case was not unreasonably dangerous as was the step in *Casey*. The step on Hart Company's premises is approximately one and one half inches higher than the step in *Casey*, allowing the height difference from the ground to be more readily recognized. Additionally, the three surfaces discussed in *Casey* – the surfaces above the step, on the step, and below the step – are all of different colors, textures, and materials. Therefore, there could be no camouflaging effect or blending of identical colors between the three surfaces as there was in *Casey*. In fact, the different colors of the black mat and tan concrete below create a color contrast that makes the step more noticeable than if the black mat were not there. Lastly the situation in *Casey* presented another obstacle that Mrs. Pragnell was not faced with – namely, the nearly 22-foot-wide porch that gave the illusion of being flush with the sidewalk and allowed the

plaintiff to take multiple steps before encountering the camouflaged step. In the present case, Mrs. Pragnell was confronted with the step immediately upon exiting through the door of Defendant Hart's showroom, as is typical when exiting a building. In reviewing the cases closely, it is clear that *Casey* and the instant case are factually distinct from one another. The facts in *Casey* showed that there may have been an unreasonably dangerous condition, whereas the facts in the present case do not. The lack of such a condition absolves Hart Company from liability under *Casey*.

In further support of their argument, Appellants reference *Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 372 N.E.2d 335 (1977). *Perry* was decided by this Court, and was used by the Fifth District in deciding *Casey*. In *Perry*, the plaintiff sustained injuries by walking into a glass wall that he was on notice of. *See id.* The wall became invisible to the plaintiff during a time when the sun shone through the glass and into the plaintiff's eyes. *Id.* at 54. This Court distinguished the facts in *Raflo*, finding that the plaintiff did not forget about the glass wall, but rather, was unable to see it due to its invisibility. *Id.* The invisibility of the wall created an unreasonably dangerous condition for which the defendant could be held liable. This Court in *Perry* held that "forgetfulness is not identifiable with . . . [a] wall which, once perceived, later became invisible." *Id.*

In their Memorandum to this Court, Appellants have argued that the step became invisible, and thus, unreasonably dangerous to Mrs. Pragnell "much like the wall at issue in *Perry*." Hart Company respectfully urges this Court not to except this assertion for two reasons. First, Appellants argue that the step was invisible for the first time on appeal to this Court. In the lower courts, Appellants categorized the alleged hazardous condition merely as a "visual obscurity," and never alleged that that the step became completely invisible like the glass wall in

Perry or the camouflaged step in *Casey*. Secondly, Appellants rely on mere allegations and are unable to point any evidence to show that the step actually was invisible to Mrs. Pragnell upon exit. Certainly, Mrs. Pragnell has not testified to this fact, which is why Appellants have not cited to her deposition to support their assertion. In *Perry*, the plaintiff testified that he did not see the glass wall as he approached it, even though he was looking directly at it. *Id.* at 53. Mrs. Pragnell has no given no such testimony, and instead, stated that she fell because she forgot the step was there.

Finally, Appellants cite *Green v. China House*, 123 Ohio App.3d 208, 703 N.E.2d 872 (5th Dist. 1997) as support for their assertion that a jury question remains as to whether Mrs. Pragnell would have been able to observe and avoid the alleged hazard on Hart Company's premises. Appellants argue that because there was a jury question in that case regarding the obviousness the hazard, there must be a jury question in the present case where the hazard was far less obvious. This case, however, is not persuasive in the way Appellants have argued it to be.

In *China House*, the hazard that caused the plaintiff to fall was readily discoverable and was even known to the plaintiff. 123 Ohio App.3d 208, 210, 703 N.E. 2d 872 (finding that the plaintiff had notice of the crate that was two feet long, two feet wide, and six inches high). Generally, a plaintiff cannot hold a defendant liable for dangers that are reasonably discoverable because they are, by definition, open and obvious. *See Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968). In the foregoing case, the hazard was reasonably discoverable. Even so, there was a potential for liability despite the general rule of no liability. This is because there were attendant circumstances that caused the plaintiff to exert less care, thus creating a triable issue as to whether the danger would have been open and obvious to someone in the plaintiff's position.

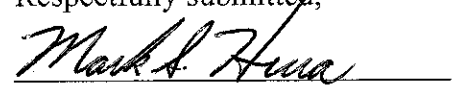
See China House, 123 Ohio App.3d 208, 212, 703 N.E. 2d 872 ("The determination of whether a hazard is latent or obvious depends upon the particular circumstances surrounding the hazard. In a given situation, factors may include lighting conditions, weather, time of day, traffic patterns, or activities engaged in at the time.").

As held by the trial court, Appellants' assertion that the black mat created a concealed or latent defect that presented a hazard to Mrs. Pragnell is without merit. There is no evidence, assuming there actually was a defect on Hart Company's premises, that the defect was non-discoverable upon ordinary inspection. Even assuming a hazardous condition existed, Appellants have not argued, nor does the evidence and testimony show, that any distraction such as lighting conditions, weather, time of day, traffic patterns, or activities engaged in at the time of the accident contributed to Mrs. Pragnell's fall. Thus, the premise upon which *China House* was decided – that attendant circumstances can render otherwise obvious hazards actionable when they are distracting to the plaintiff – is not applicable to the facts of the present case. 123 Ohio App.3d 208, 703 N.E. 2d 872.

IV. CONCLUSION

Appellants have not established a need for this Court to reiterate the well-established standard for summary judgment under the facts of this case or otherwise. As such, Appellee Edward R. Hart Company respectfully request that this Court decline to exercise jurisdiction over this appeal.

Respectfully submitted,



Mark S. Hura

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been sent by regular U.S. Mail this 18th day of April, 2012 to the following:

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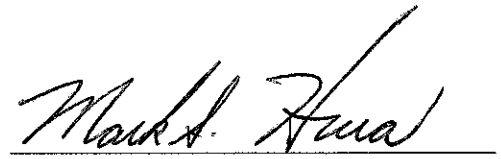

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