STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL MARTIN,

Plaintiff-Appellee,

vs.

MILHAM MEADOWS I LIMITED PARTNERSHIP and MEDALLION MANAGEMENT, INC.,

Defendants-Appellants.

Supreme Court No. 154360
Court of Appeals No. 328240

Kalamazoo County Circuit Court No: 2013-000485-NO

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**MICHIGAN DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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JOSEPH SUKUP (P39898)
Keller & Keller
*Attorneys for Plaintiff/Appellee*
*Michael Martin*
814 Porter St.
P.O. Box 7
Saint Joseph, MI 49085
(269) 983-7333
**joes@2keller.com**

ROBERT G. KAMENEC (P35283)
Plunkett Cooney
*Attorneys for Defendants/Appellants*
38505 Woodward Avenue, Ste. 100
Bloomfield Hills, MI 48304
(248) 901-4068
**rkamenec@plunkettcooney.com**

RICHARD E. HOLMES (P42114)
AARON D. WISELY (P60464)
Holmes & Wisely, P.C.
*Attorney for Plaintiff/Appellee*
2090 Celebration Drive, NE, Suite 202
Grand Rapids, MI 49525
(616) 447-9610
**rholmes@holmeswisely.com**
**awisely@holmeswisely.com**

JONATHAN B. KOCH (P80408)
Collins Einhorn Farrell PC
*Attorneys for Amicus Curiae MDTC*
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141
**Jonathan.Koch@CEFlawyers.com**

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## Order Appealed From and Jurisdictional Statement

Amicus curiae, Michigan Defense Trial Counsel (MDTC), agrees with the parties' statements of the basis for this Court's appellate jurisdiction.

## Statement of Interest

MDTC is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case[1].

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employers, made a direct or indirect contribution, financial or otherwise, to the preparation or submission of this brief.

## Statement of Questions Presented

**Whether genuine issues of material fact preclude summary disposition on the plaintiff's claim that the stairs at issue were not "fit for the use intended by the parties" and that the defendants did not keep the stairs in "reasonable repair" under MCL 554.139(1)(a) and (b)?**

The Court of Appeals answered, "Yes."

Plaintiff-appellee answers, "Yes."

Defendants-appellants answers, "No."

Amicus Curiae MDTC answers, "No."

## Statement of Facts

MDTC relies on the Statement of Facts contained in defendants-appellants Milham Meadows I LP and Medallion Management, Inc.'s Application for Leave to Appeal.

## Standard of Review

MDTC relies on the Standard of Review contained in defendants-appellants' Application for Leave to Appeal.

## Argument

### A. This Court has held that MCL 554.139(1)(a)'s implied covenant of fitness does not require perfection. To be "fit," stairs like the ones that Martin slipped on do not have to be as safe and accessible as possible. Rather, they just have to provide reasonable access to different levels of the building. In its opinion, the Court of Appeals held that the stairs at issue were not fit because defendants-appellants failed to implement additional safety measures. That departure from this Court's precedent warrants reversal.

MCL 554.139(1)(a) provides that in every residential lease there is an implied covenant to keep the "premises and all common areas…fit for the use intended by the parties." This Court addressed the "fit for the use intended" standard in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 432; 751 NW2d 8 (2008).

The plaintiff in *Allison* slipped and fell when he was walking on one to two inches of snow that was on top of ice in the parking lot of his apartment complex. *Id.* at 423. The issue was whether a parking lot covered with snow and ice is fit for its intended use. After recognizing that "fit" as used in MCL 554.139(1)(a) means "adapted or suited; appropriate," this Court explained that "the intended use of a

parking lot includes the parking of vehicles." *Id.* at 429, citing *Random House Webster's College Dictionary* (1997). And it recognized that a parking lot is "fit for its intended use as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id.*

Accordingly, the defendant's sole duty under MCL 554.139(1)(a) was to "ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have **reasonable access** to their parked vehicles." *Id.* at 429 (emphasis added). As a result, this Court held that MCL 554.139(1)(a) does not require perfection: "**The statute does not require a lessor to maintain [the premises] in an ideal condition or in the most accessible condition possible**." *Id.* at 430 (emphasis added). Consequently, "mere inconvenience of access" does not breach the covenant. *Id.* Since the "plaintiff did not show that the condition of the parking lot…precluded access to his vehicle," this Court held that the defendant was entitled to summary disposition on the implied covenant of fitness claim.

After *Allison*, the Court of Appeals applied the covenant of fitness in MCL 554.139(1)(a) to a stairway in *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 782 NW2d 800 (2010), lv den 488 Mich 945 (2010).[2] In that case, the plaintiff, slipped and fell on the steps of an icy outdoor stairway at her apartment complex. Though she successfully walked down the steps to get her mail, she

[2] Although the Supreme Court denied leave, three justices dissented from the denial order. They would have granted leave to determine whether the Court of Appeals properly distinguished *Allison*. *Hadden*, 488 Mich at 945 (MARKMAN, J., dissenting).

slipped when she started going back up. *Id.* at 131. The stairs were covered by a roof, but the plaintiff noticed that the gutters over the steps were overflowing with water, and icicles had formed and there was also no salt on the stairway. *Id.*

Relying on *Allison*, the Court of Appeals explained that "MCL 554.139(1)(a) does not require perfect maintenance of a stairway." *Id.* at 130. So the "**stairway need not be in an ideal condition, nor in the most accessible condition possible.**" *Id.* (emphasis added). Rather, a stairway only needs to "provide tenants '**reasonable access**' to different building levels" in order to be fit for its intended use. *Id.* (emphasis added), quoting *Allison*, 481 Mich at 430. However, the Court of Appeals concluded that there was a question of fact based on the specific facts at issue in that case: "Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use." *Id.* at 132.

Under *Allison*, MCL 554.139(1)(a) doesn't require lessors to maintain their property "in an ideal condition or in the most accessible condition possible." *Allison*, 481 Mich at 430. Rather, conditions like stairways are "fit" for a particular use as long as they provide "reasonable access" to tenants. *Id.* Accordingly, to establish that stairs are unfit under MCL 554.139(1)(a), a tenant must provide evidence of more than "mere inconvenience"—i.e., a plaintiff must establish that he or she was unable to use the stairs to access different levels of the building. *Id.*

In most of its unpublished opinions dealing with MCL 554.139(1)(a), the Court of Appeals has faithfully applied *Allison* by holding that MCL 554.139(1)(a) does not impose a duty of perfect maintenance and that plaintiffs must demonstrate more than mere inconvenience to establish a statutory violation. See, e.g., *Martinez v TMF II Waterchase, LLC*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2016 (Docket No. 329931); 2016 WL 7333466 (**Exhibit 1**) (finding that although the icy sidewalk at issue "may not have been 'ideal' or 'the most accessible condition possible' " there was no evidence that the ice "rendered it anything more than merely inconvenient");[3] *Tremper v Westland Colonial Village Apts*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2016 (Docket No. 325176); 2016 WL 3362491 (**Exhibit 2**) (reversing denial of summary disposition where "Plaintiff did not show that the condition of the sidewalk precluded him from walking on it");[4] *Wildbahn v KMG Prestige, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2016 (Docket No. 324517); 2016 WL 1038047 (**Exhibit 3**) (affirming summary disposition where the evidence established that "numerous other people were able to safely walk through the [condition at issue]…which plainly demonstrates that multiple individuals were able to use the [condition] for its intended purpose"); *Young v Michigan Tree Apts LLC*, unpublished opinion per

[3] This Court has held *Martinez* in abeyance pending the resolution of this case. See Supreme Court Docket No. 155197.

[4] Judge Shapiro dissented, arguing that whether the physical structure of a premises is fit for its intended use is always a question of fact. *Tremper*, 2016 WL 3362491 (SHAPIRO, J., dissenting).

curiam of the Court of Appeals, issued May 19, 2015 (Docket No. 320439); 2015 WL 2414498 (**Exhibit 4**) (affirming summary disposition where other individuals were able to safely access the condition where plaintiff fell).

In a second group of opinions, several Court of Appeals panels have held defendants to a higher standard than "reasonable access" by focusing on whether the defendant could have done more to make the condition safer and more accessible. See, e.g., *Battle v Anderson Villas LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2017 (Docket No. 332276); 2017 WL 2569140 (**Exhibit 5**) (reversing grant of summary disposition because reasonable minds could differ regarding whether defendants maintained a sidewalk in light of the weather conditions, "the evidence of preventative measures taken to alleviate the dangers of ice and snow accumulation, and the fact that plaintiff did fall");[5] *Dougherty v Nykel-Somerset Management, LLC*, unpublished opinion per curiam of the Court of Appeals, issued September 4, 2012 (Docket No. 303910); 2012 WL 3854788 (**Exhibit 6**) (finding a question of fact where the defendant "failed to address whether the failure to maintain proper lighting for the sidewalk rendered it unfit for use").

1. **Even though Martin safely used the allegedly slippery steps almost two thousand times over three years, the Court of Appeals concluded that the stairs did not provide reasonable access.**

[5] Judge O'Brien dissented, arguing that summary disposition was warranted because "there is no evidence…establishing that the seemingly ordinary ice and snow accumulation was anything more than merely inconvenient. *Battle*, 2017 WL 2569140 at *4 (O'BRIEN, J., dissenting).

The Court of Appeals' opinion in this case falls into the second category. In determining that the stairs in Martin's building were unfit, the panel didn't analyze whether the stairs provided "reasonable access" to the different level of Martin's building or whether the alleged defects in the stairs precluded him from doing so. Instead, the Court of Appeals panel focused on whether defendants could have remedied the alleged defects by painting or modifying the steps.[6]

By focusing on what defendants could have done to make the stairs less slippery, the Court of Appeals essentially ignored the fact that Martin had used the step that he slipped on more than a thousand times over more than three years without any issue.[7] Indeed, the panel dismissed this fact by concluding that, "standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use."[8] The Court of Appeals further compounded their error by considering allegedly defective aspects of the stairs that had nothing to do with the top steps—i.e., the condition that allegedly caused Martin's fall.[9]

The Court of Appeals got it backwards. Under *Allison's* analytical framework, evidence about additional measures that could have made the top steps more accessible or convenient to use is irrelevant. The same is true for any evidence of allegedly defective aspects that have nothing to do with alleged slipperiness of the top steps, e.g., the angle of the stairs, the height of the ceiling,

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[6] Court of Appeals' Slip Opinion at 9-10 (Ex. A to Defendants-Appellants' Supplemental Brief).
[7] *Id.*
[8] *Id.* at 10.
[9] *Id.* at 9-10.

etc. Instead, for the purposes of determining fitness under MCL 554.139(1)(a), all that matters is whether the stairs provided reasonable access. Here, it's clear that the stairs at issue did that. Despite any alleged imperfections, the allegedly slippery steps provided Martin with safe and reasonable access to the different levels of his building safely more than a thousand times over the course of three years.

The stairs in Martin's building might not have been perfect. But, contrary to the Court of Appeals' reasoning in this case, MCL 554.139(1)(a) does not require perfection and was not intended to impose an onerous burden that would deter people from leasing property. Neither the plain language of MCL 554.139(1)(a) nor this Court's case law requires landlords to keep stairs in an ideal condition or even the most accessible condition possible in order to be considered "fit." *Allison*, 481 Mich at 430. Instead, as this Court held in *Allison*, MCL 554.139(1)(a) embraces a reality that "mere inconvenience" does not render a condition "unfit." *Id*. To be "fit," stairs only need to provide tenants with "reasonable access" to the different levels of a building or structure. *Id.*; see also *Hadden*, 287 Mich App at 130. Because the steps at issue did that, the Court of Appeals erred by holding that that top steps were unfit for their intended use.

By holding that the stairs were unfit because defendants-appellants failed to take additional steps to improve access, the Court of Appeals' opinion essentially held that landlords need to implement any measure that could potentially make the stairs safer or more accessible in order to avoid liability under MCL 554.139(1)(a).

That ruling conflicts with this Court's opinion in *Allison*. As noted above, it's not the only Court of Appeals opinion that does. As one of the members of this Court has recognized, Michigan's lower courts have applied the rule set forth in *Allison* inconsistently and created uncertainty by generating dueling sets of "contradictory cases." See *Dotson v Garfield Court Assoc, LLC*, 498 Mich 861; 865 NW2d 36, 39 (2015) (MARKMAN, J., dissenting).

The Court of Appeals' underlying opinion creates uncertainty about the scope of the statutory duties owed by a lessor under MCL 554.139. That undermines the rule of law and makes it difficult for landlords to understand how to fulfill their statutory duties and avoid violating the law. It also makes claims under MCL 554.139 harder to defend (or prosecute). Attorneys on both sides of the "v" need to know what standard will be applied and what facts are relevant in order to develop their theories and defenses. Inconsistent Court of Appeals opinions—especially the ones where, like here, the Court of Appeals sidesteps this Court's binding authority—prevent that from happening by confusing the issues and relevant facts. In the current environment, attorneys and their clients won't know which standard applies—or which facts are relevant—until their Court of Appeals panel is assigned.

Accordingly, this Court should grant leave to appeal, reverse the Court of Appeals, and reiterate that MCL 554.139 does not require perfection and is not violated where a condition, albeit a defective one, is objectively capable of be safely negotiated.

### B. MCL 554.139(1)(b) requires landlords to keep their premises in a state of "reasonable repair." It does not require landlords to go

**beyond repair and restoration by taking additional steps to make the premises as safe and accessible as possible.**

MCL 554.139(1)(b) provides that lessors have a duty "[t]o keep the premises in reasonable repair." As this Court recognized in *Allison*, "[t]he plain meaning of 'reasonable repair' as used in MCL 554.139(1)(b) requires the repair of a defect in the premises." *Allison*, 481 Mich at 434, quoting *Teufel v Watkins*, 267 Mich App 425, 429 n 1; 705 NW2d 164 (2005). A "defect" means "a fault or shortcoming; imperfection." *Allison*, 481 Mich at 434, quoting *Random House Webster's College Dictionary* (1997). So this Court went on to explain that because "[d]amage to the property would constitute an imperfection in the property that would require mending[,]…repairing a defect equates to keeping the premises in a good condition as a result of restoring or mending damage to the property." *Allison*, 481 Mich at 434. Consequently, a landlord's duty under MCL 554.139(1)(b) is limited to repairing damage and restoring the premises to its original condition—i.e., nothing in the plain language of MCL 554.139(1)(b) requires landlords to go beyond restoration by taking additional steps to make the premises safer or more accessible.

A landlord's duty to reasonably repair defects under MCL 554.139(1)(b) is also limited to fixing defects that the landlord had notice of—i.e., that it knew or had reason to know about. *Raatika v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978). As a result, a landlord has no duty to inspect the premises for defects; rather, he or she only has to repair "defects brought to his attention by the tenant or by his casual inspection of the premises." *Id.* at 431.

Here, Martin slipped on the top step of stairway leading to the basement of his building. The Court of Appeals concluded that questions of fact remained regarding whether defendants-appellants failed to keep the stairs in "reasonable repair" as required by MCL 554.139(1)(b) after Martin "provided notice of the steps' slippery condition."[10] That's wrong for two reasons.

First, the Court of Appeals relied on the opinion of plaintiff's expert that the stairs were slippery—and, thus, not in reasonable repair—because they were not painted with slip-resistant paint and lacked anti-skid adhesive tape or tread strips on the corner of the steps.[11] Based on that expert's opinion, the Court of Appeals reversed the trial court's conclusion that the steps were in "reasonable repair" because defendants failed to take additional measures to ensure that the stairs were safe.

But there is no record evidence that the additional measures identified by plaintiff's expert's report were part of the original condition of the allegedly defective top steps. As this Court recognized in *Allison*, "reasonable repair" is limited to repairing damage and restoring the premises to its original condition—i.e., nothing in the plain language of MCL 554.139(1)(b) requires landlords to undertake additional measures to make the premises safer or more accessible than it was originally. *Allison*, 481 Mich at 434. Since none of the additional measures identified by plaintiff's expert fall within the duty of "reasonable repair" under the

[10] Court of Appeals' Slip Opinion at 10 (Ex. A to Defendants-Appellants' Supplemental Brief).
[11] *Id.* at 9.

plain language of MCL 554.139(1)(b), defendants' failure to implement those additional measures can't subject them to liability under MCL 554.139(1)(b). That's true even if the additional measures would make the stairs safer or more accessible.

The second problem with the Court of Appeals "reasonable repair" holding is that the panel improperly focused the notice analysis on the premises generally rather than the specific condition that allegedly caused Martin's injuries. The Court of Appeals concluded that questions of fact remain regarding whether defendants had notice that the top step of the stairway was slippery.[12] But, although Martin had previously complained about other unrelated aspects of the stairs that he felt were defective, he never said or did anything that would put defendants on notice that the specific condition at issue—again, the top step that he slipped on—was in anyway defective or in need of repair.[13] The Court of Appeals erred by focusing on defendants' knowledge of other allegedly defective aspects of the stairs that were unrelated to Martin's injury. Consequently, defendants aren't subject to liability under MCL 554.139(1)(b) because they lacked actual or constructive notice that the top step was slippery—i.e., that the specific condition at issue was in anyway defective or in need of repair—before the accident.

In this case, the Court of Appeals held that the duty of reasonable repair in MCL 554.139(1)(b) requires defendants to implement safety measures that make a premises safer and more accessible than its the original condition. The panel also

[12] Court of Appeals' Slip Opinion at 8 (Ex. A to Defendants-Appellants' Supplemental Brief).
[13] *Id.*

expanded the scope of notice—and, thus, liability under MCL 554.139(1)(b)—beyond the specific condition at issue. By doing both of those things, the Court of Appeals overstepped the bounds of the analytical framework articulated in *Allison* and *Raatika*. Much like its improper expansion of the implied covenant of fitness discussed above, the Court of Appeals' decision alters the boundaries of the covenant of reasonable repair, which creates uncertainty regarding how landlords can fulfill their duties under MCL 554.139(1)(b). This Court should grant leave to appeal in order to reverse the Court of Appeals. It should also reiterate that MCL 554.139(1)(b)'s duty of reasonable repair: (1) does not require landlords to undertake and implement additional measures to make their premises safer or more accessible than its original state, and (2) is not triggered unless the landlord had actual or constructive notice of the specific condition at issue.

### C. Conclusion

For the reasons stated above, MDTC requests that this Court reverse the Court of Appeals' error of law. In doing so, this Court should reiterate its holding in *Allison* that MCL 554.139(1)(a) does not require perfection and is not violated where a allegedly defective condition provides "reasonable access." This Court should also hold that the duty articulated in MCL 554.139(1)(b) does not require landlords to go beyond restoring premises to their original condition and is not triggered unless the landlord had actual or constructive notice of the specific condition at issue.

COLLINS EINHORN FARRELL PC

BY: /s/ Jonathan B. Koch
JONATHAN B. KOCH (P80408)
*Attorney for Amicus Curiae MDTC*
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141
Jonathan.Koch@ceflawyers.com

Dated: August 18, 2017

# EXHIBIT

# 1

2016 WL 7333466
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Dernia MARTINEZ, Plaintiff–Appellant,
v.
TMF II WATERCHASE, LLC, Defendant–Appellee.

Docket No. 329931.
|
Dec. 15, 2016.

Kent Circuit Court; LC No. 14–008385–NI.

Before: WILDER, P.J., and MURPHY and O'BRIEN, JJ.

**Opinion**

PER CURIAM.

***1** Plaintiff, Dernia Martinez, appeals as of right the circuit court's opinion and order granting summary disposition to defendant, TMF II Waterchase, LLC, pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff slipped and fell on a patch of ice on the sidewalk leading from the door of her apartment building to the parking lot. The apartment complex is owned by defendant. As a result of her fall, plaintiff sustained a variety of injuries. Several months after her fall, plaintiff filed a two-and-a-half-page complaint against defendant, alleging that defendant "[f]ail[ed] to use reasonable care to maintain the premises and all common areas in a safe condition" and "[v]iolat[ed] the covenant of habitability found at MCL 554.139...." Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that it exercised reasonable care, that the icy patch was open and obvious and not unreasonably dangerous, and that, while not absolutely perfect, the sidewalk was fit for its intended purpose. The circuit court agreed, granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10). Relying on our Supreme Court's decision in *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419; 751 NW2d 8 (2008), the circuit court explained, in pertinent part, that the icy patch on the sidewalk, while inconvenient, did not render it unfit for its intended purpose. This appeal followed.

On appeal, plaintiff, relying primarily on this Court's opinion in *Benton v. Dart Props., Inc.*, 270 Mich.App 437; 715 NW2d 335 (2006), first argues that the circuit court erred in granting summary disposition in defendant's favor because an icy patch on a sidewalk renders the sidewalk unfit for its intended purpose as a matter of law. We disagree.

"A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties 'fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law.' " *Allison*, 481 Mich. at 424–425 (citations omitted; alterations in original). In reviewing a motion for summary disposition under subsection (C)(10), courts are required to view the record in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Id.* at 425. A genuine issue of material fact exists when reasonable minds could differ with respect to an issue. *Id.*

While somewhat unclear, it appears that plaintiff's two-and-a-half-page complaint sets forth two distinct causes of action: negligence and breach of a statutory duty under MCL 554.139(1). Only the second cause of action is at issue for purposes of this appeal, presumably because the condition at issue, i.e., a patch of ice, is open and obvious as a matter of law. See, e.g., *Buhalis v. Trinity Continuing Care Servs.*, 296 Mich.App 685; 822 NW2d 254 (2012). Nevertheless, "[i]f defendants had a duty under MCL 554.139(1)(a) or (b) to remove snow and ice ... then plaintiff could proceed on his second claim even if plaintiff's negligence claim was barred by the 'open and obvious' danger doctrine." *Allison*, 481 Mich. at 425. Thus, if defendant breached its duty under this statutory provision, assuming that such a breach caused damages, a plaintiff would be entitled to a contract remedy. *Id.* at 426.

***2** MCL 554.139 provides, in pertinent part, as follows:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.

  

> To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

"The primary goal of statutory interpretation is 'to ascertain the legislative intent that may be reasonable inferred from the words expressed in the statute.' " *Allison,* 481 Mich. at 427 (citation omitted). When statutory language is clear, courts interpret the language according to its plain and ordinary meaning. *Id.*

First, the parties dispute whether the sidewalk, which constitutes a common area, *Allison,* 481 Mich. at 427–428, was fit for its intended use under MCL 554.139(1)(a). Plaintiff claims that the sidewalk was rendered unfit for its intended use under MCL 554.139(1)(a) as a matter of law due to the icy patch that caused plaintiff's fall. The Supreme Court has defined the word " '[f]it' " in this context "as 'adapted or suited; appropriate [.]' " *Allison,* 481 Mich. at 429 (citations omitted). Thus, a sidewalk is fit for its intended purpose so long as it is suitable for walking. See, e.g., *id.* at 430 (explaining that "[a] parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles."). To show that a common area, such as a sidewalk or parking lot, is unfit for its intended use, a plaintiff must provide evidence reflecting more than "[m]ere inconvenience." *Id.* That is, a plaintiff must present evidence indicating that he or she was unable to use the sidewalk or parking lot. *Id.*

Applying those rules to the facts of this case, we agree with the circuit court's conclusion that the duty under MCL 554.139(1)(a) with regard to the accumulation of ice on a sidewalk would only be triggered under much more exigent circumstances that those presented in this case. *Allison,* 481 Mich. at 430 ("While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case."). Indeed, as with a parking lot, "[t]he statute does not require a lessor to maintain a [sidewalk] in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a [sidewalk]." The condition presented in this case, i.e., a sidewalk with an icy patch on an early winter morning, may not have been "ideal" or "the most accessible condition possible," but plaintiff did not present any evidence that the icy patch on the sidewalk rendered it anything more than merely inconvenient. Therefore, under *Allison,* the circuit court's decision was correct.

***3** On appeal, plaintiff claims that "Defendant's building defects" and "the inadequacy of the Defendant's ice removal measures" constitute questions of fact for the jury, but those claims do not address the fact that plaintiff slipped and fell on a seemingly ordinary patch of ice. Like in *Allison,* where the plaintiff slipped and fell "when he was walking on one to two inches of accumulated snow in the parking lot of his apartment complex," 481 Mich. at 423, this scenario, i.e., where plaintiff slipped and fell while walking on a small patch of ice, does not rise to the level of the exigent circumstances that are necessary to trigger a duty under MCL 554.139(1)(a). Plaintiff also claims that defendant failed to adequately design "the roof's drainage system" to prevent icy patches like the one she fell on. However, as the circuit court correctly recognized, plaintiff did not mention the design of "the roof's drainage system" in her complaint, and design defects are not implicated by the duty to repair under MCL 554.139(1)(b). Furthermore, plaintiff's only support for this claim is an architect's opinion that, had the design been improved, plaintiff's slip and fall might not have occurred, and Michigan law is clear in that speculation alone is simply insufficient to overcome a motion for summary disposition. See, e.g., *Fields v. Suburban Mobility Auth. for Regional Transp.,* 311 Mich.App 231, 238; 874 NW2d 715 (2015).

Plaintiff also claims that reversal is compelled in this case under *Benton.* While understandable given the factual similarities between the facts of that case and those present here, her reliance on *Benton* is ultimately misplaced. Plaintiff claims that *Benton* stands for the proposition that icy sidewalks are not fit for their intended use as a matter of law, but this proposition was expressly rejected in *Allison* by our Supreme Court two years after this Court's decision in *Benton.* Were we to follow *Benton* as plaintiff suggests and hold that the duty under MCL 554.139(1)(a) is triggered under the seemingly ordinary accumulation of ice and snow on a winter morning, we would be required to expressly ignore *Allison.* We

simply cannot do so. See *State Treasurer v. Sprague,* 284 Mich.App 235, 242; 772 NW2d 452 (2009) (providing that we are bound by our Supreme Court's decisions). Plaintiff similarly claims that reversal is compelled in this case under *Hadden v. McDermitt Apartments, LLC,* 287 Mich.App 124; 782 NW2d 800 (2010), but, as we have explained before, *Allison,* not *Hadden,* controls when a tenant slips on ice or snow in a parking lot or sidewalk in an apartment complex. Plaintiff's second argument on appeal challenges the circuit court's denial of her motion for reconsideration. In light of our conclusion above, however, we agree with the circuit court's decision in this regard. Furthermore, plaintiff's assertions of error as it relates to this argument do not address the circuit court's denial of the motion for reconsideration in any manner. Thus, they are abandoned. See *Ypsilanti Fire Marshal v. Kircher,* 273 Mich.App 496, 543; 730 NW2d 481 (2007) (providing that an issue is abandoned when not raised in the statement of questions presented). Similarly, plaintiff's arguments in this regard are cursory and lack sufficient factual and legal support for us to review them adequately; thus they are abandoned. See *Peterson Novelties, Inc.,* 259 Mich.App 1, 14; 672 NW2d 351 (2003) (providing that a party may not simply announce his or her position without also citing to adequate factual and legal support).

***4** Nevertheless, in briefly addressing them, we find each meritless. Plaintiff claims that MCR 2.116(G)(1) prohibited defendant from filing a rebuttal brief before the circuit court, but that is untrue. Furthermore, the record does not reflect that this rebuttal brief "misled" the circuit court as plaintiff contends given the fact that the circuit court's decision was correct. Plaintiff also takes issue with the circuit court's comments that the icy patch was visible and avoidable, but those comments, alone, certainly do not compel reversal. Indeed, the visibility and avoidability of the icy patch play a role in a circuit court's determination as to whether an icy patch, in and of itself, renders a sidewalk unfit for its intended purpose. Plaintiff additionally takes issue with the circuit court's comment that the actual cause of the icy patch was unknown, claiming instead that it was known because plaintiff saw that water was dripping onto the sidewalk where the icy patch was located. Whether plaintiff knew the cause of the icy patch is largely irrelevant in the analysis under MCL 554.139(1). Finally, plaintiff claims that the circuit court ignored *Benton* and "lifted statements from *Allison.*" We see no error in the circuit court following, or lifting statements from, our Supreme Court's decision in *Allison* for the reasons described above.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

MURPHY, J. (dissenting).

***4** Although *Benton v. Dart Props Inc.,* 270 Mich.App 437; 715 NW2d 335 (2006), predated *Allison v. AEW Capital Mgt., LLP,* 481 Mich. 419; 751 NW2d 8 (2008), *Allison* did not overrule *Benton.* Indeed, the only reference by the *Allison* Court to the *Benton* decision was favorable, agreeing with its interpretation of the term "common areas" as used in MCL 554.139(1)(a) and ruling that a parking lot in an apartment complex, like the sidewalk at issue in *Benton,* are common areas for purposes of the statute. *Allison,* 481 Mich. at 428. Therefore, in my view, *Benton* remains binding precedent, MCR 7.215(J)(1), and, given that plaintiff here allegedly slipped and fell on a patch of ice on a sidewalk located just outside her apartment building, *Benton* is directly and certainly more on point than *Allison.* On the strength of *Benton,* along with consideration of the documentary evidence, I conclude that there exists a genuine issue of material fact regarding whether the common area where plaintiff claimed to have slipped and fell was fit for its intended use, MCL 554.139(1)(a). Accordingly, I would reverse the trial court's ruling granting summary disposition in favor of defendant. Thus, I respectfully dissent.

This Court reviews de novo a trial court's decision on a motion for summary disposition, *Loweke v. Ann Arbor Ceiling & Partition Co., LLC,* 489 Mich. 157, 162; 809 NW2d 553 (2011), as well as questions of statutory construction, *Oakland Co. Bd. of Co. Rd. Comm'rs. v. Mich. Prop. & Cas. Guaranty Ass'n,* 456 Mich. 590, 610; 575 NW2d 751 (1998). With respect to a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut. Ins. Co. v. Dells,* 301 Mich.App 368, 377; 836 NW2d 257 (2013), set forth the governing principles:

> ***5** In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a

> matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

MCL 554.139(1)(a) provides that a landlord covenants "[t]hat the premises and all common areas are fit for the use intended by the parties." And the open and obvious danger doctrine is not available to avoid liability when a defendant has a statutory duty to maintain property in accordance with MCL 554.139. *Allison,* 481 Mich. at 425 n. 2. A violation of MCL 554.139(1)(a) can be established on the basis of snow or ice that renders a common area unfit for its intended use. *Id.* at 430. In *Benton,* 270 Mich.App at 444–445, this Court ruled:

> We conclude that sidewalks, such as the one used by plaintiff, constitute "common areas" under MCL 554.139(1)(a). Therefore, a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. Because the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose. Thus, ... defendant owed plaintiff a duty of reasonable care regardless of the openness or obviousness of the icy sidewalk conditions.

The *Benton* opinion fully supports allowing the instant case to go forward. The *Allison* Court, which was aware of *Benton* and favorably cited the decision, expressed no dissatisfaction with *Benton,* and it did not indicate in any form or fashion that it was overruling *Benton.*

The majority indicates that adhering to *Benton* would require ignoring *Allison;* however, this contention ignores that *Allison* concerned a parking lot and the case at bar concerns a sidewalk; a distinction that effectively is not being given any weight by the majority. The majority concludes as a matter of law that the icy sidewalk was a mere inconvenience and that the ice did not render the sidewalk unfit for its intended use. Again, this conclusion fails to recognize the difference between the intended use of a parking lot and the intended use of a sidewalk. The case should be submitted to a jury for resolution. [1]

***6** Finally, the majority initially mentions that "a patch of ice[ ] is open and obvious as a matter of law." I disagree. In *Hoffner v. Lanctoe,* 492 Mich. 450, 463–464; 821 NW2d 88 (2012), our Supreme Court observed:

> With specific regard to ice and snow cases, this Court has rejected the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability under any circumstances. Rather, a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. However, it is also well established that wintry conditions, like any other condition on the premises, may be deemed

  

> open and obvious. Michigan courts thus ask whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger. [Citations, quotation marks, and alteration brackets omitted.]

Accordingly, ice is not open and obvious as a matter of law; rather, ice *may be* open and obvious depending on the circumstances presented. [2]

I respectfully dissent.

**All Citations**

Not Reported in N.W.2d, 2016 WL 7333466

Footnotes

1 Because I have come to the conclusion that *Benton* is directly on point and remains controlling, I find it unnecessary to examine *Hadden v. McDermitt Apartments, LLC,* 287 Mich.App 124; 782 NW2d 800 (2010), which involved a snowy and icy staircase at an apartment complex.

2 With respect to plaintiff's argument under MCL 554.139(1)(b) about the awning not being kept in reasonable repair, I would simply rule that plaintiff has failed to present an argument on appeal assailing the trial court's ruling that *design* defects are not encompassed by the duty to repair under MCL 554.139(1)(b).

# EXHIBIT

# 2

2016 WL 3362491
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

David TREMPER, Plaintiff–Appellee,
v.
WESTLAND COLONIAL VILLAGE APARTMENTS, Westland Colonial Delaware, L.L.C., and Westland Colonial Village, L.L.C., Defendants–Appellants.

Docket No. 325176.
|
June 16, 2016.

Before: GADOLA, P.J., and SERVITTO and SHAPIRO, JJ.

**Opinion**

PER CURIAM.

Defendants appeal by leave granted a trial court order denying their motion for summary disposition as it relates to plaintiff's claim for breach of duties imposed by MCL 554.139(1). We reverse and remand for entry of an order granting defendants' motion.

Plaintiff leased an apartment at a complex owned and operated by defendants. One night, while walking on a sidewalk leading to the front entryway of his apartment building, plaintiff tripped and fell. He later found an area of the sidewalk where one section of pavement was approximately one inch higher than the adjoining section. He filed this action, alleging claims for premises liability and violation of § 39(1). The trial court granted defendants' motion as it related to the premises liability claim, which ruling is not at issue here, but denied the motion as it related to the alleged statutory violation.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Oliver v. Smith,* 290 Mich.App. 678, 683, 810 N.W.2d 57 (2010). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v. Globe Life Ins. Co.,* 460 Mich. 446, 454–455, 597 N.W.2d 28 (1999).

MCL 554.139(1) provides, in relevant part:

> In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

The statute imposes two different duties on lessors, one extending to both "the premises and all common areas," and one extending only to "the premises." *Allison v. AEW Capital Mgt., LLP,* 481 Mich. 419, 433, 751 N.W.2d 8 (2008). The "common areas" are "those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants." *Id.* at 427, 751 N.W.2d 8. Outdoor sidewalks within an apartment complex constitute "common areas." *Benton v. Dart Props. Inc.,* 270 Mich.App. 437, 442–444, 715 N.W.2d 335 (2006). Because the covenant to repair under § 39(1)(b) is limited to the premises, it does not apply to common areas. *Allison,* 481 Mich. at 432, 751 N.W.2d 8. Because the sidewalk at issue is a common area, plaintiff's claim that defendants violated the duty to keep it in reasonable repair must fail.

The duty to keep a common area such as a sidewalk fit for its intended use does not require the lessor to maintain it "in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a" sidewalk. *Id.* at 430, 751 N.W.2d 8. To be "fit" for a particular

  

use is to be "adapted or suited" for that use. *Id.* at 429, 751 N.W.2d 8. "[T]he intended use of a sidewalk is walking on it," *Benton,* 270 Mich.App. at 444, 715 N.W.2d 335, and providing reasonable access to various areas within the apartment complex. See, e.g., *Allison,* 481 Mich. at 429, 751 N.W.2d 8 (a parking lot is fit for its intended use "as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles"), and *Hadden v. McDermitt Apartments, LLC,* 287 Mich.App. 124, 130, 132, 782 N.W.2d 800 (2010) ("the primary purpose of a stairway is for walking" and providing " 'reasonable access' to different building levels"). Therefore, defendants were obligated to keep the sidewalk adapted or suited for walking and providing tenants with reasonable access to different areas within the complex.

In this case, photographs show that the sidewalk was a relatively smooth and even walkway with a single, slight height differential between two sections of pavement that extended out from the right edge approximately one-third the width of the sidewalk. While plaintiff first testified that the height differential was approximately one inch (and his wife testified to a one to one and one-half inch height differential) and several months later testified that the height differential was one and one-half to three inches, the exact height differential is not dispositive in this case. There were lights on the exterior of the building and, while the sidewalk was not fully illuminated, plaintiff admitted that there was enough ambient light to see the sidewalk ahead of him and make his way along it. Plaintiff testified that he was not looking down as he walked, but he could see the sidewalk where he was walking if he looked down. As our Supreme Court stated in *Allison,* 481 Mich. at 430, 751 N.W.2d 8, "Mere inconvenience ... will not defeat the characterization of [a sidewalk] as being fit for its intended purpose." Plaintiff did not show that the condition of the sidewalk precluded him from walking on it. The facts on the record show that plaintiff was able to walk on the sidewalk generally without issue, that he could have avoided the differential if had walked on the two thirds of the sidewalk that had no differential, and that he would likely have been able to step over the slight differential had he been looking down as he walked. Thus, the evidence establishes that there is no genuine issue of material fact that the sidewalk differential was no more than a mere inconvenience and that the sidewalk was fit for its intended use. Accordingly, the trial court erred in denying defendants' motion for summary disposition with respect to plaintiff's claim alleging a violation of § 39. [1]

Reversed and remanded for entry of an order granting summary disposition in favor of defendants. We do not retain jurisdiction.

GADOLA, P.J., (concurring).

I concur in the majority opinion but write separately to offer a brief response to the dissent. The dissent suggests that the question before us in this case is not the nature of the duty owed, but rather who makes the determination as to whether that duty has been satisfied. The dissent suggests that this determination in all such cases is for the trier of fact. I disagree.

Summary disposition under MCR 2.116(C)(10) is warranted when there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Grange Ins. Co. of Mich. v. Lawrence,* 494 Mich. 475, 489–490, 835 N.W.2d 363 (2013). In this case, for purposes of this motion, there is no dispute as to the condition of the sidewalk and the circumstances under which plaintiff fell on that sidewalk. The only question that remains is whether this set of undisputed facts entitles defendants to judgment as a matter of law.

In a tort action, generally, whether a duty exists is a question of law for the court and not the province of the jury. *Maiden v. Rozwood,* 461 Mich. 109, 131, 597 N.W.2d 817 (1999). With respect specifically to an alleged breach of duty under MCL 554.139(1)(a), our Supreme Court has held that when the facts are undisputed and reasonable minds could not differ that a particular common area was fit for the use intended by the parties, then there has been no breach of duty under the statute and the plaintiff's claim in that instance fails as a matter of law. *Allison v. AEW Capital Management, LLP,* 481 Mich. 419, 430, 751 N.W.2d 8 (2008). In the case before us, the undisputed evidence establishes that the sidewalk differential was so slight that reasonable minds could not disagree that the sidewalk was fit for its intended use, namely, walking. Under such undisputed circumstances, no question for the jury exists.

The dissent suggests that the legislature intended that any defect in a sidewalk, no matter how minute, creates a question of fact as to whether the landlord has met its

duty to maintain the sidewalk in a manner that it remains fit for its intended use. The dissent divines this legislative intent from its reading of an unrelated statute, § 2a of the governmental tort liability act (GTLA), MCL 691.1402a. In that section, the legislature created a presumption that a municipality has maintained a sidewalk in reasonable repair whenever the height differential involved is less than 2 inches. This so-called "2–inch rule" existed at common law until the Supreme Court abolished it in 1972[1]. Rescission of the common law rule created an "open season" in government liability cases involving sidewalk defects that the dissent would have us adopt under the statute at issue in this case, where any allegation of defect of any size would always reach a jury. In 1999, the legislature codified the 2–inch rule in the GTLA as a way to bring a defined limit to the cases alleging governmental liability involving sidewalk defects that can (not must) be submitted to a jury[2]. It is ironic, then, for the dissent to conclude that the legislature's adoption of a limit on litigation in an unrelated statute shows that the legislature wanted the sort of no-holds-barred legal regime that it sought to eliminate in the GTLA to exist under the statute we consider here.

The dissent also points out that subsection (4) of § 2a of the GTLA, MCL 691.1402a(4), leaves it to the court to decide as a matter of law whether the presumption of reasonable repair under subsection (3) of the GTLA, MCL 691.1402a(3), has been rebutted. The dissent takes this as an indication that the absence of such language in the statute applicable here precludes the trial court from making *any* determination regarding duty under the statute. As the authority cited above and in the majority opinion reaches the opposite conclusion, however, I am unable to agree. This approach is directly contrary to that set forth by our Supreme Court in *Allison,* 481 Mich. at 430, 751 N.W.2d 8, where the Court found the question whether a duty had been breached to be removed from the province of the jury when the facts were undisputed and reasonable minds could not differ that the condition of the common area in question rendered that common area fit for its intended use.

Perhaps most troubling is that the dissent offers no limiting principle to the rule it proffers, so that presumably any defect in a sidewalk, no matter how small, would create a fact question that must be submitted to a jury. I am unwilling to conclude, as the dissent has, that the legislature intended that even the most miniscule alleged defect in a sidewalk creates a question of fact over whether a landlord has met its duty to maintain the sidewalk for the purpose intended.

SHAPIRO, J. (dissenting).

I respectfully dissent. Defendant landlord does not dispute that there was a height differential between two slabs of its sidewalk in the common area of its apartment complex, and at least for purposes of this motion, defendant does not dispute that plaintiff tripped on the elevated slab suffering injury. According to plaintiff's testimony, the height differential was somewhere between 1½ inches to 3 inches in height. Defendant offered no evidence to contradict this testimony.

The majority correctly observes that a landlord need only maintain a sidewalk that is fit for its intended purpose and that such a duty can be met even if the sidewalk in question is not ideal or perfect. I fully agree with this view. More to the point, the duty in this case is not grounded in common law, but is a creature of statute. The duty defined by the text of the statute is that the common areas of the property must be "fit for the use intended by the parties." MCL 554.139(1)(a). While the duty of maintenance of areas shared in common by multiple tenants is less demanding than the duty to keep a particular tenant's premises in reasonable repair, "[k]eeping common areas fit for their intended use may well require a lessor to perform maintenance and repairs to those areas...." *Allison v. AEW Capital Mgt., LLP,* 481 Mich. 419, 433, 751 N.W.2d 8 (2008).

The issue before us then is not the nature of the duty; the statute makes that clear. The issue before us is who makes the determination as to whether that duty has been satisfied or not. The answer again is provided by the text of the statute, which we must apply as written. The legislature chose to leave the determination of whether a common area is fit for its intended use to the trier of fact. It provided no definition, no guidelines, and no presumptions for either judges or jurors to follow. When the legislature wishes to define such matters it can readily do so. For example, MCL 691.1402a, which governs actions against local governments for defects in public sidewalks, sets forth a specific minimum level of vertical discontinuity that must be shown for the matter to be submitted to the jury. It provides:

> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> * * *
>
> (4) Whether [this] presumption ... has been rebutted is a question of law for the court. [MCL 691.1402a.]

Subsection (3)(a) of this statute leaves no doubt that the legislature knows how to direct the judiciary to require a particular height differential before allowing the issue of reasonableness to go to the jury. Subsection (4) leaves no doubt that the legislature knows how to tell us when an issue is "a question of law for the court," as opposed to a question of fact for the jury.

We are not, however, tasked with applying MCL 691.1402a in this case. Instead, MCL 554.139(1)(a) applies, and provides in pertinent part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.

In this statute, the legislature did not direct the judiciary to require a particular height differential before allowing the issue of fitness to go to the jury, nor did it provide that such an inquiry was a question of law for the courts. Further, nothing in the statutory language suggests that whether the physical structure of a common area is fit for its intended use is a question of law as opposed to a question of fact. [1]

Whether this panel of three judges thinks this sidewalk was fit for its intended purpose is of no moment. The issue is whether a jury thinks it does. That is what the legislature has provided.

**All Citations**

Not Reported in N.W.2d, 2016 WL 3362491

Footnotes

1 In light of our decision, it is unnecessary to address defendants' additional argument that the lease validly modified defendants' obligations under § 39(2).

1 *Robinson v. City of Lansing,* 486 Mich. 1, 10, 782 N.W.2d 171 (2010), citing *Rule v. Bay City,* 387 Mich. 281, 195 N.W.2d 849 (1972).

2 MCL 691.1402a; *Robinson,* 486 Mich. at 10, 782 N.W.2d 171.

1 In *Allison,* 481 Mich. at 430, 751 N.W.2d 8, the Supreme Court held that a minor and transient natural accumulation of snow did not render a parking lot unfit for parking and accessing vehicles. The case did not involve allegations of structural defects in the parking lot itself.

# EXHIBIT

# 3

2016 WL 1038047
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Roger WILDBAHN and Ruth Wildbahn, Plaintiffs–Appellants,
v.
KMG PRESTIGE, INC., d/b/a Breton Village Apartments, Defendant–Appellee.

Docket No. 324517.
|
March 15, 2016.

Kent Circuit Court; LC No. 13–008157–NO.

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

**Opinion**

PER CURIAM.

***1** Plaintiffs Roger and Ruth Wildbahn [1] appeal as of right the trial court's grant of summary disposition in favor of defendant KMG Prestige, Inc., in this slip and fall case. We affirm.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 29, 2011, at approximately 9:00 a.m., Roger and his neighbor, Sandra Price, exited plaintiffs' first-floor apartment at Breton Village Apartments through the back patio door. To reach Roger's vehicle, which was parked in a rear parking lot, Roger and Price walked on paver blocks leading from plaintiffs' back patio to a mulched area surrounding a paved courtyard. They continued through the mulch, walking between shrubs and a bench, in order to cross the courtyard, which included shuffleboard courts and benches for the tenants' recreation. As they walked, Price and Roger both noticed a patch of ice near the bench closest to plaintiffs' patio blocks. This ice was visible from up to 15 feet away.

When Roger and Price returned to the apartment complex, Price walked ahead of Roger on the same path that they took out of the building. Both were carrying groceries. As Price turned to warn Roger to avoid the ice that they had seen previously, she watched him slip and fall on that ice. Roger suffered a broken leg.

In August 2013, plaintiffs filed a complaint, alleging claims arising from common law negligence and statutory violations under MCL 554.139. [2] Defendant moved for summary disposition under MCR 2.116(C)(10), asserting, *inter alia,* that the open and obvious danger doctrine barred plaintiffs' common law negligence claim and that plaintiffs could not demonstrate a violation of MCL 554.139. In response, plaintiffs asserted that a genuine issue of material fact existed as to the intended use of the courtyard and as to whether defendant failed to keep the courtyard fit for this use pursuant to MCL 554.139. Plaintiffs did not address the merits of their common law negligence claim. Additionally, plaintiffs attached a proposed amended complaint as an exhibit to their response to defendant's motion for summary disposition, but they did not separately move for leave to file an amended complaint at that time.

The trial court granted defendant's motion for summary disposition. Consistent with plaintiffs' agreement at the summary disposition hearing to dismiss the common law negligence claim and proceed on the statutory claim, the trial court held that the open and obvious danger doctrine barred plaintiffs' common law negligence claim. Additionally, it held that even if it assumed that the intended purpose of the courtyard was to provide an alternate route for accessing the parking lot, plaintiffs could not establish that the courtyard was not fit for its intended purpose. It noted that Roger and Price had utilized the same path earlier that morning, and that Price had successfully navigated the courtyard using the exact same path as plaintiff without falling. The trial court also rejected plaintiffs' claim that the parties contractually altered defendant's statutory obligation through the lease because the complaint did not include a breach of contract claim. Finally, the trial court did not consider plaintiffs' proposed amended complaint because (1) plaintiffs never moved for leave to file it and (2) plaintiffs did not attach the lease agreement to the proposed amended complaint as required by MCR 2.113(F)(1).

  

***2** Plaintiffs subsequently filed a motion for reconsideration of the trial court's grant of summary disposition in conjunction with a motion to file an amended complaint. The trial court denied the motion for reconsideration on the grounds that plaintiffs could not demonstrate a palpable error. The trial court also denied plaintiffs' motion to file an amended complaint, reasoning that the issue was moot.

## II. SUMMARY DISPOSITION

Plaintiffs first argue that the trial court erred in granting summary disposition in favor of defendant with regard to their statutory claim under MCL 554.139(1)(a). We disagree.

### A. STANDARD OF REVIEW

We review *de novo* a trial court's grant or denial of summary disposition. *Moraccini v. Sterling Hts,* 296 Mich.App 387, 391; 822 NW2d 799 (2012). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), we may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties.' " *Calhoun Co v. Blue Cross Blue Shield Michigan,* 297 Mich.App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v. Barton Malow Co,* 480 Mich. 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v. AEW Capital Mgt, LLP,* 481 Mich. 419, 425; 751 NW2d 8 (2008).

### B. ANALYSIS

It is undisputed that the area in which Roger fell was a common area. Accordingly, plaintiffs' claims are limited to defendant's statutory duty to maintain the premises under MCL 554.139(1)(a),[3] which provides, "In every lease or license of residential premises, the lessor or licensor covenants ... [t]hat the premises and all common areas are fit for the use intended by the parties." Thus, given the uncontested nature of the area, our inquiry turns to identifying the intended use of the courtyard and whether it was fit for that use. See MCL 554.139(1)(a). Even if we assume, without deciding,[4] that the courtyard was intended to be used as an alternate route for accessing the parking lot, plaintiffs have not established the existence of a genuine issue of material fact as to whether the courtyard was unfit for that purpose.

MCL 554.139(1)(a) creates a duty of fitness. "[F]it for the use intended by the parties" means that the common area must be *adapted* or *suited* for the purpose intended by the parties. *Allison,* 481 Mich. at 429. In *Allison,* the plaintiff argued that an apartment parking lot was not fit for its intended purpose based on two facts: (1) the lot was covered with two inches of snow, and (2) the plaintiff fell. *Id.* at 430. In rejecting the plaintiff's claims, the Michigan Supreme Court explained:

> ***3** The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Id.*]

Subsequently, we have held that the principles set forth in *Allison* apply to all common areas. *Hadden v. McDermitt Apartments, LLC,* 287 Mich.App 124, 130; 782 NW2d 800 (2010). Accordingly, a landlord is neither required to provide perfect maintenance nor ensure "the most accessible condition possible" in order to fulfill its duties on the statute. *Id.*

In this case, the evidence presented with defendant's motion for summary disposition and plaintiffs' response established that Price and Roger were able to walk through the courtyard, consciously avoiding the ice, within two hours of Roger's fall. Roger admitted that he

  

and Price used the same path through the courtyard when they returned to plaintiffs' apartment with their groceries, at which time Price walked through the courtyard without any issues. The evidence also indicates that numerous other people were able to safely walk through the courtyard in order to assist Roger after his fall—including, among others, Jesse Treece, Ruth, Beverly McCondra, and EMS personnel—which plainly demonstrates that multiple individuals were able to use the courtyard for its intended purpose within minutes of the incident. The patch of ice was small in comparison to the rest of the courtyard, and the rest of the area did not have snow or ice on it. The ice was clearly visible to Roger before the fall and to individuals standing as much as 15 feet away after the fall. There is nothing in the record supporting the conclusion that the presence of the ice patch denied Roger reasonable access to his apartment from the parking lot, even though the courtyard was not in an "ideal condition." *Allison,* 481 Mich. at 430. Again, perfect maintenance is not required under MCL 554.139(1)(a), and a landlord is not required to maintain a common area "in the most accessible condition possible." *Hadden,* 287 Mich.App at 130.

In addition, Roger only needed to take a slightly different path through the remaining portion of the courtyard, which was undisputedly clear, in order to reach his patio. Changing his path would have constituted a mere inconvenience, and a "mere inconvenience" posed by a small patch of ice does not render the courtyard unfit for walking. See *Allison,* 481 Mich. at 430. Cf. *Hadden,* 287 Mich.App at 132 (finding that "black ice on a darkly lit, unsalted stairway," which may have been caused or increased by overflowing water from nearby gutters," posed a hidden danger that was greater than a "mere inconvenience"); *Benton v. Dart Properties, Inc,* 270 Mich.App 437, 438, 444; 715 NW2d 335 (2006) (concluding that a sidewalk that was "*covered* with ice" approximately four to five feet long with no lighting to illuminate the ice was not fit for walking, *i.e.,* the use intended by the parties [emphasis added] ). Therefore, like the plaintiff in *Allison,* plaintiffs have failed to establish a genuine issue of material fact as to whether the courtyard was unfit for its intended use of providing an alternate route between the apartment building and the parking lot, as the only facts presented by plaintiffs to show that the common area was unfit for its intended purpose were the facts that (1) there was ice in an isolated portion of the courtyard and (2) Roger fell on this single patch of ice. See *Allison,* 481 Mich. at 430.

***4** Next, plaintiffs argue that the parties modified defendant's statutory duty so that defendant had a higher duty under the lease agreement to keep the courtyard "safe," not only "fit for its intended purpose," as required by MCL 554.139(1)(a). We disagree. MCL 554.139(2) provides that "parties to the lease ... may modify the obligations imposed by this section where the lease ... *has a current term of at least 1 year.*" (Emphasis added.) If the statutory language is plain and unambiguous, we must apply it as written. *Ford Motor Co v. Woodhaven,* 475 Mich. 425, 438–439; 716 NW2d 247 (2006). The only lease presented in the trial court stated that (1) "[t]he initial term" of the agreement begins on October 24, 2008, and ends on September 30, 2009, and that (2) "the [a]greement will continue for successive terms of one month each unless automatically terminated" as provided in the lease. Thus, because Roger's fall occurred on December 29, 2011, at which time the current lease term was month-to-month (based on the only lease proffered by plaintiff), the language in the lease did not modify defendant's duty to keep the courtyard fit for the use intended by the parties under MCL 554.139(1)(a). Therefore, the standard used by the trial court was proper.

Plaintiffs also appear to argue that defendant owed them a duty to remove the ice or provide a warning about the ice because it was not a natural accumulation. They assert that defendants proffered no evidence that the ice was a natural accumulation, and they contend, without citing any evidence in the lower court record, that "the logical conclusion is that this was snow that had melted after not being properly removed and had re-frozen." In support of this claim, plaintiffs cite two opinions in governmental liability cases—one of which was a dissenting opinion in a case that was later overruled—and they fail to explain how those unrelated cases apply to defendant's statutory duty in this case. Moreover, even if the source of the ice was dispositive here, plaintiffs proffer only speculation, and identify no evidence in the record, in support of their assertion that the ice was not a natural accumulation. Thus, we deem this argument unsupported and, therefore, abandoned. See *Peterson Novelties, Inc v. City of Berkley,* 259 Mich.App 1, 14; 672 NW2d 351 (2003) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with

little or no citation of supporting authority. Argument must be supported by citation to appropriate authority or policy. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." [Citations omitted .] ).

## III. MOTION TO FILE AN AMENDED COMPLAINT

Finally, plaintiffs argue that the trial court erred when it denied, contrary to MCR 2.116(I)(5), their motion to file an amended complaint after it granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We disagree.

### A. STANDARD OF REVIEW

***5** A trial court's denial of a motion to amend is reviewed for an abuse of discretion. *Diem v. Sallie Mae Home Loans, Inc,* 307 Mich.App 204, 215–216; 859 NW2d 238 (2014), citing *Wormsbacher v. Seaver Title Co,* 284 Mich.App 1, 8; 772 NW2d 827 (2009). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v. Adelman,* 486 Mich. 634, 639; 786 NW2d 567 (2010).

### B. ANALYSIS

As an initial matter, we note that plaintiffs fail to dispute the basis of the trial court's ruling, which was that the issue was moot. When a party fails to address the basis of the trial court's decision, this Court "need not even consider granting ... the relief [sought]." *Joerger v. Gordon Food Serv, Inc,* 224 Mich.App 167, 175; 568 NW2d 365 (1997).

Nevertheless, even in reviewing the merits of plaintiffs' claim, we conclude that the trial court properly denied plaintiffs' motion to amend their complaint. MCR 2.116(I)(5) provides, "If the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." "MCR 2.118(A)(2) provides that '[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.' " *Wormsbacher,* 284 Mich.App at 8 (alteration in original; citation omitted). "[I]n ordinary cases, motions to amend are generally granted." *Diem,* 307 Mich.App at 216, citing *Lane v. KinderCare Learning Ctrs, Inc,* 231 Mich.App 689, 697; 588 NW2d 715 (1998). Likewise, "[b]ecause a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons." *Wormsbacher,* 284 Mich.App at 8. "Reasons that justify denying leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility." *Id.* "An amendment would be futile if it is legally insufficient on its face, and the addition of allegations that merely restate those allegations already made is futile." *Id.* at 8–9; see also *Lane,* 231 Mich.App at 697 ("An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim.").

Plaintiffs' amendment was futile. First, the proposed amended complaint merely restated the allegations already made. The only differences were: (1) the addition of two paragraphs concerning defendant's alleged duty to maintain the common areas in a "safe" condition under the lease (which included an additional parenthetical phrase in an attempt to plead an exception to the requirement that the lease had to be attached under MCR 2.113(E)); (2) an alteration in the heading of count one to indicate "*contractual and* statutory violations" instead of "*negligence and* statutory violations" (emphasis added); and (3) a handful of immaterial word changes. Except for these modifications, the text of the original complaint and the proposed amended complaint were practically identical. Most significantly, as discussed *supra,* plaintiffs' addition of the language in the lease to the complaint would not change defendant's obligation under the statute from "fit for its intended use" to "safe" because the current lease term was month-to-month. Accordingly, plaintiffs' additional claim arising from the language in the lease lacked merit, rendering the amendment futile.

***6** Thus, the trial court did not abuse its discretion in denying plaintiffs' motion to file an amended complaint. See *Edry,* 486 Mich. at 639. [5]

## IV. CONCLUSION

The trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10) and properly denied plaintiffs' motion to amend their complaint.

Affirmed.

**All Citations**

Not Reported in N.W.2d, 2016 WL 1038047

Footnotes

1 In the interest of clarity, we will refer to the plaintiffs by their first names when referring to them individually in this opinion.

2 Plaintiff Ruth only alleged a loss of consortium claim, which was derivative to Roger Wildbahn's claims.

3 A landlord's statutory duty under MCL 554.139(1)(b) does not apply to common areas. *Allison,* 481 Mich. at 432. Additionally, we recognize that "the open and obvious danger doctrine does not bar [a] plaintiff's claim against [a] defendant for violating its statutory obligation under MCL 554.139(1)(a)." *Benton v. Dart Properties, Inc,* 270 Mich.App 437, 445; 715 NW2d 335 (2006).

4 The trial court similarly operated under this assumption when it decided defendant's motion for summary disposition.

5 The trial court denied plaintiffs' motion on the basis that the issue was moot in light of the procedural history of the case. In so ruling, it appears that the trial court failed to consider MCR 2.116(I)(5) and MCR 2.118 in making its ruling. Nevertheless, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v. Michigan Dept of Transp,* 256 Mich.App 1, 3; 662 NW2d 822 (2003).

# EXHIBIT

# 4

2015 WL 2414498
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Renee YOUNG, Plaintiff–Appellant,
and
Kevin Young, Plaintiff,
v.
MICHIGAN TREE APARTMENTS LLC, Defendant–Appellee.

Docket No. 320439.
|
May 19, 2015.

Macomb Circuit Court; LC No.2012–002758–NO.

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

**Opinion**

PER CURIAM.

***1** Plaintiff Renee Young[1] appeals as of right a trial court order granting summary disposition to defendant Michigan Tree Apartments pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

## I. FACTS

In February 2011, plaintiff was a lessee of an apartment owned and operated by defendant. On February 7, 2011, plaintiff slipped and fell on "black ice" in the parking lot of the apartment complex when she was walking to her vehicle with her friend Chris Wright. Plaintiff commenced this lawsuit alleging (1) a common law negligence/premises liability claim and (2) a statutory claim under MCL 554.139(1).

During discovery, plaintiff testified that on February 7, 2011, there was a lot of snow outside, but the parking lot to the apartment complex had been plowed that day. Plaintiff testified that there were no lights in the parking lot and it was dark outside and residents had problems with the parking lots not being cleared. Plaintiff testified that she had lived in Michigan since she was 13 years old and was familiar with the melt and freeze cycle and the possibility of ice underneath snow.

At about 6:15 p.m. that evening, plaintiff and Wright walked side by side toward Wright's vehicle. There was a little concrete slab outside the door and then a sidewalk. The two women turned left. The sidewalk was a little icy and may have had a little snow. Wright and plaintiff walked around the ice on the sidewalk "until we ran into the snow-bank." Then Wright told plaintiff that she had to park "over there," and plaintiff asked, "Why didn't you tell me? We would have gone the other way." But even if they had gone right instead of left, they would have encountered a snow-bank. The snow was piled up over the sidewalk, and they had to go around the snow-bank to get to Wright's car. Otherwise, the sidewalk was mostly clear with maybe a light dusting of snow. The snowbank was "covering both portions of the sidewalk," and plaintiff decided, "I'm not going through all that snow." They walked behind the cars through the parking lot because plaintiff "didn't want to walk between snow and the car bumpers."

Plaintiff testified that she and Wright walked by two or three cars and "then I was down." They were almost to Wright's vehicle, about one car away. Plaintiff did not notice snow on the parking lot surface and she did not "feel any [ice] and I'm usually very conscious of slips." Plaintiff did not see any ice just before she fell. She was looking straight ahead. She and Wright walked around or stepped over the ice on the sidewalk. After she fell, plaintiff raised her head and saw "this parking lot's a sheet of ice, but you couldn't see it."

Plaintiff testified that her son and the emergency medical personnel (EMS) did not fall while attending to her in the parking lot. The next day, plaintiff had surgery and a titanium rod and pins were placed in her leg.

Wright testified that when she arrived on February 7, 2011, she encountered snow-banks "up by the sidewalk" and "[i]t was kind of hard to walk ... there was a little bit of snow." Wright walked over the snow-bank and then continued straight ahead on the sidewalk. She did not encounter any ice in the parking lot. The snow-bank was

  

"[m]aybe three feet high" and "it [k]ind of swallowed up my boot."

***2** Wright stayed inside with plaintiff about 40 to 45 minutes and then they left about 5:15 to 5:20 p.m. Wright testified that when the women left the building, they went "the wrong way" because plaintiff thought Wright would have parked on the other side. Had they gone the more direct route, they could have walked from the sidewalk to the vehicles without traversing as much of the parking lot. As it was, they "went around and then I [Wright] showed her where I parked and I was talking to her, and I looked back to see her and she was laying on the ground." In the area where plaintiff fell, "[t]he parking lot was a sheet of ice, black ice, too, ... it was dark and it was hard to see."

Wright testified that the parking lot did not appear to have been plowed or recently cleaned near the cars where plaintiff fell. Wright saw snow in front of the cars, but no snow on top of the ice where plaintiff fell. The lot had emptied out and plaintiff fell about eight parking spaces from Wright's car. Wright was able to see the ice with the aid of the flashing lights from the emergency vehicles. No overhead lights illuminated the parking lot. Wright thought "there was a place where the light had been, but the light wasn't working at the time."

In its motion for summary disposition, defendant argued, in part, that plaintiff's negligence claim was barred by the "open and obvious" danger doctrine. With respect to statutory liability, at a motion hearing, defendant agreed that the parking lot was a common area, but argued that defendant was not liable for snow and ice on the common area.

The trial court granted defendant's motion with respect to plaintiff's statutory claim but denied the motion with respect to plaintiff's common law claim, finding that there was a question of fact as to whether the icy condition was open and obvious.

Defendant moved for reconsideration. Defendant contended that constructive knowledge of weather conditions did not show knowledge of the icy condition of defendant's parking lot. At a hearing, the trial court stated, "the Court gave credence to the weather forecasters as a basis of creating a factual basis.... And I've obviously reconsidered that." The trial court further noted that "the meteorologist's affidavit as to general weather conditions does not constitute actual or constructive knowledge on the part of the defendant." The trial court granted summary disposition to defendant on the record and entered an order granting reconsideration "for the reasons stated on the record" and dismissing plaintiff's lawsuit with prejudice. Plaintiff appeals as of right.

## II. ANALYSIS

We review a trial court's ruling on a motion for summary disposition de novo. *Devillers v. Auto Club Ins.* Ass'n, 473 Mich. 562, 566–567; 702 NW2d 539 (2005). Motions for summary disposition under MCR 2.116(C)(10) should be granted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." *Joseph v. Auto Club Ins. Ass'n,* 491 Mich. 200, 206; 815 NW2d 412 (2012). The court considers the pleadings, affidavits, depositions, and other evidence in a light most favorable to the nonmoving party. *Id.* Rulings on motions for reconsideration are reviewed for an abuse of discretion. *Sherry v. East Suburban Football League,* 292 Mich.App 23, 31; 807 NW2d 859 (2011).

***3** Although plaintiff's complaint was somewhat ambiguous, the complaint contained two claims (1) a common law negligence/premises liability claim and (2) a statutory claim under MCL 554.139(1). See *Adams v. Adams (On Reconsideration),* 276 Mich.App 704, 710–711; 742 NW2d 399 (2007) ("it is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond more procedural labels to determine the exact nature of the claim.") We proceed by separately addressing whether the trial court properly dismissed each of these claims.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v. Dart Props,* 270 Mich.App 437, 440; 715 NW2d 335 (2006). "The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land." *Id.* A tenant is an invitee of his or her landlord and the landlord "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." *Id.* (quotation marks and citation omitted). However, "[a]bsent special aspects, this duty

generally does not require the owner to protect an invitee from open and obvious dangers." *Id.* at 441 (quotation marks and citations omitted).

Our Supreme Court has explained that "black ice" conditions are "open and obvious when there are indicia of a potentially hazardous conditions, including the specific weather conditions present at the time of the plaintiff's fall." *Janson v. Sajewski Funeral Home, Inc.*, 486 Mich. 934, 934–935; 782 NW2d 201 (2010). In *Janson,* the Supreme Court found that the black ice that the plaintiff slipped on in a parking lot was open and obvious because "the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening." *Id.* The Supreme Court explained that "[t]hese wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection ... Moreover, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous." *Id.*

In this case, the evidence showed that there were indicia of potentially hazardous conditions in the parking lot where plaintiff slipped and fell. *Id.* Here, plaintiff slipped and fell in February in Michigan and plaintiff was aware of the melt-freeze cycle that occurs in the winter in Michigan. There was a lot of snow around plaintiff's apartment building and, although the parking lot had been plowed on the day of the accident, tenants had a problem with parking lots not being cleared of snow. Furthermore, there was a "light dusting" of snow outside, there were snow-banks near the sidewalk, and Wright encountered a "little bit of snow" on her way into the apartment complex about 45 minutes before plaintiff fell on the ice. Additionally, Wright testified that there were patches of ice and snow on the sidewalk near the exit of the building. Like in *Janson,* in this case, "all these wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." *Id.* Similarly, like in *Janson,* the slippery parking lot did not have any "special aspect." *Id.* The danger was avoidable where Wright testified about an alternate, more direct, route to her vehicle and where our Supreme Court has held that this type of icy condition is not unreasonably dangerous. *Id.,* see also *Joyce v. Rubin,* 249 Mich.App 231, 243; 642 NW2d 360 (2002).

***4** In short, there was no genuine issue of material fact to support that defendant breached its duty to plaintiff where plaintiff's injury arose from an open and obvious hazard. *Benton,* 270 Mich.App at 440–441. Accordingly, the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(10) as to plaintiff's common law negligence claim albeit it appears to have done so for different reasons. See *Gleason v. Dep't of Trans,* 256 Mich.App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.)"

With respect to plaintiff's statutory claim, although the open and obvious danger doctrine does not apply to a statutory duty, in this case, because there was no evidence to support that defendant breached its statutory duty to maintain the parking lot fit for its intended use, plaintiff's claim under MCL 554.139 failed as a matter of law.

MCL 554.139 provides in relevant part as follows:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

A parking lot to a leased residential complex is a "common area" for purposes of this statute. *Allison v. AEW Capital Mgmt., LLP,* 481 Mich. 419, 428; 751 NW2d 8 (2008). However, "the lessor's duty to repair under MCL 554.139(1)(b) does not apply to common areas and, therefore, does not apply to parking lots." *Id* . at 435. Moreover, "[a] lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice." *Id.*

With respect to a lessor's duty to maintain a parking lot so that it is "fit for the intended use ..." under MCL 554.139(1)(a), our Supreme Court has explained as follows:

> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access ... will not defeat the characterization of a lot as being fit for its intended purposes. [*Allison,* 481 Mich. at 430.]

In *Allison,* the plaintiff was walking in a parking lot covered in one to two inches of snow when he slipped and fractured his ankle. *Id.* at 423. When the plaintiff was on the ground, he noticed that there was ice underneath the displaced snow. *Id.* Our Supreme Court held that these conditions did not render the parking lot unfit for its intended use because the plaintiff could not show that the snow and ice prevented him access to his vehicle. *Id.* at 430. The Supreme Court explained that the plaintiff's statutory claim under MCL 554.139(1)(a) failed as a matter of law because, irrespective of the snow and ice, evidence showed that tenants were able to "enter and exit the parking lot, to park their vehicles therein, and to access those vehicles." *Id.*

***5** In this case, *Allison* is controlling as to plaintiff's statutory claim. To the extent that plaintiff alleged a claim under MCL 554.139(1)(b), that claim failed as a matter of law because defendant, as a lessor, "has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice." *Allison,* 481 Mich. at 428. Similarly, plaintiff's claim under MCL 554.139(1)(a) fails as a matter of law where, like in *Allison,* plaintiff could not show that apartment tenants were unable to "enter and exit the parking lot, to park their vehicles therein, and to access those vehicles." *Id.* at 430. Specifically, Wright testified that she parked in the parking lot, exited her vehicle, and entered the apartment complex approximately 40 minutes before plaintiff slipped and fell. In addition, Wright traversed the parking lot with plaintiff to within a few steps of her vehicle and then back into the building after plaintiff fell and she did not fall. Moreover, Wright testified that there was an alternate more direct route to access her parked vehicle and there was no other evidence to show that tenants were unable to use the parking lot for its intended use. Accordingly, the trial court did not err in granting defendant's motion for summary disposition with respect to plaintiff's statutory claim.

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in granting defendant's motion for reconsideration and it did not err in granting defendant's motion for summary disposition as to both of plaintiff's claims in this case.

Affirmed. No costs awarded. MCR 7.219(A). We do not retain jurisdiction.

**All Citations**

Not Reported in N.W.2d, 2015 WL 2414498

Footnotes

1 For purposes of this opinion, we refer to Renee Young as "plaintiff" because the claims of plaintiff Kevin Young were voluntarily dismissed in the trial court.

# EXHIBIT

# 5

2017 WL 2569140
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Stephanie BATTLE, Plaintiff–Appellant,
v.
ANDERSON VILLAS LLC, and Erie Investments LLC, Defendants–Appellees,
and
Anderson Villas Management Co., Anyl Management Co., and MMC of Ypsilanti, Defendants.

No. 332276
|
June 13, 2017

Washtenaw Circuit Court, LC No. 14–000748–NO

Before: O'Brien, P.J., and Servitto and Stephens, JJ.

**Opinion**

Per Curiam.

***1** In this slip and fall action, plaintiff Stephanie Battle appeals as of right the trial court order granting summary disposition to defendants Anderson Villas LLC, and Erie Investments LLC [1] under MCR 2.116(C)(10), after finding that the icy patch upon which plaintiff slipped was open and obvious and not effectively unavoidable, and that the sidewalk was fit for its intended use under MCL 554.139(1)(a). We reverse and remand.

## I. BACKGROUND

Plaintiff suffered a fall at around 11:30 p.m. on February 25, 2014, outside of her home as she was walking to her car. In February 2014, plaintiff lived in Anderson Villas, an apartment complex with 302 ranch-style apartments, divided into 46 buildings. The entry door of plaintiff's apartment abutted a small walkway with grass on each side. Her walkway led to a common area sidewalk that abutted the parking lot. The parking spaces abutted the common area sidewalk.

As a consequence of her fall, plaintiff sued the defendants. Her suit asserted a claim of common law negligence as well as a claim for violation of MCL 554.139 for failure to keep the premises and all common areas fit for their intended use. Discovery ensued, and after its close defendants motioned the court for summary disposition under MCR 2.116(C)(10). Defendants argued that the sidewalk was fit for its intended purpose because it provided a reasonable means of traversing from tenants' vehicles to their apartments and that the patch of ice that plaintiff allegedly slipped on was open and obvious. Plaintiff argued that the common area in which she suffered her fall was not fit for its purpose of giving her reasonable access to her vehicle, that the danger that occasioned her fall was neither open nor obvious and that regardless the danger was effectively unavoidable. The trial court agreed with defendants.

## II. STANDARD OF REVIEW

We review de novo the trial court's decision to grant or deny a motion for summary disposition. *Adair v. State*, 470 Mich. 105, 119; 680 N.W.2d 386 (2004).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Maiden v. Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999) ].

  

## III. ANALYSIS

### A. STATUTORY DUTY

Plaintiff argues that the trial court erred in finding that there was no genuine issue of material fact regarding whether defendants breached their duty under MCL 554.139(1)(a) to maintain the sidewalk in a manner that was fit for its intended use of walking. We agree.

***2** Since this is a motion under (C)(10), it is useful to review the evidence presented by the plaintiff in opposition to the motion. Plaintiff testified that on the morning of her accident, she observed patches of ice on the sidewalk abutting her walkway and was able to traverse safely to her door. Later that evening, she left her apartment with the intention to start her automobile before work. She testified that she fell before reaching her car. She testified that she felt ice underneath her after she fell. Plaintiff also offered the testimony of her neighbors regarding the complex's laxity in clearing ice and snow as well as testimony from them and her daughter, Raven Battle, who came to her aid that night, regarding the extent of icing on the sidewalk and grass. Plaintiff offered expert testimony regarding the weather conditions leading up to her fall from Certified Consulting Meteorologist Paul H. Gross. According to Gross, as of February 22, large piles of plowed and shoveled snow would have existed adjacent to the sidewalks in the complex. Gross' opinion is supported by Martin's testimony that on the night of plaintiff's fall, there was an accumulation of a foot of snow on the grass. Gross' review of meteorological conditions showed that temperatures on February 22 and 23 were above freezing and caused the snow remaining on sidewalks to melt. According to Gross, weather records further indicated that after 4:00 p.m. on February 23 through February 25, temperatures remained well below freezing. This observation is partly supported by defendants' snow removal log for February 26 that indicated the temperature was 22° Fahrenheit and from the depositions of multiple witnesses who relayed that it was very cold on the night of plaintiff's fall, as well as Raven's testimony that her windows were frosted. Gross opined that "the ice Plaintiff encountered developed no later than late afternoon on the 24th, but very likely on the late afternoon of the 23rd." At the very least, ice would have existed for over twenty-four hours on plaintiff's sidewalk.

Additionally, the court had before it the testimony of Gyde, defendants' person responsible for snow removal. Gyde's testimony was that he worked Monday through Friday, 8:00 a.m. to 5:00 p.m. Snow removal logs indicated that the last snow removal work performed was on February 20, 2014, which was a Thursday. On that day, Gyde and another worker plowed, snowblowed and salted the complex, applying 20 bags or 1000 pounds of "ice melt" due to thick ice which Gross opined was due to thawing and refreezing. Gyde next plowed and performed an ice break up after plaintiff's fall using 750 pounds of materials over two days. Gyde testified that while no removal was done until after the fall, he had driven around the complex, including the area of plaintiff's apartment on the day before her fall

The parties arguments as to the viability of plaintiff's statutory claim focuses on two cases: *Allison v. AEW Capital Mgt LLP*, 481 Mich. 419; 751 N.W.2d 8 (2008) and *Benton v. Dart Properties*, 270 Mich. 437, 443 n 2; 715 N.W.2d 335 (2006). Reading them, not as contradictory but complimentary, we find that under either case, the record in this case presents a material question of fact to be resolved by a jury.

Both cases analyze MCL 554.139 and discuss a lessor's duty to keep the "premises and all common areas [ ] fit for the use intended by the parties." The duty under MCL 554.139(1)(a) "arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Allison*, 481 Mich. at 425. MCL 554.139 "impose[s] a higher duty on landlords than on other inviters given the enhanced rights afforded tenants." *Benton*, 270 Mich. at 443 n 2. The provisions of MCL 554.139 are to be liberally construed. MCL 554.139(3).

Both cases address the physical scope of this heightened duty. "[I]n the context of leased residential property, 'common areas' describes those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants. A lessor's duties regarding these areas arise from the control the lessor retains over them." *Allison*, 481 Mich. at 427. "[T]he sidewalks located within an apartment complex constitute 'common areas.' " *Benton*, 270 Mich. App. at 442. "Therefore, a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use," which the *Benton* Court concluded was for walking. *Id.* at 442–444.

Defendants argue that *Allison*, *supra*, is controlling. In *Allison*, the "[p]laintiff fractured his ankle during a fall when he was walking on one to two inches of accumulated snow in the parking lot of his apartment complex." 481 Mich. at 423. Like here, the plaintiff alleged negligence and a breach of MCL 554.139(1). Our Supreme Court held, "[a] lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles." *Id.* The Court further held, that MCL 554.139(1)(a) "does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes." *Id.* at 430. The Court concluded that the facts "that the lot was covered with one to two inches of snow and that [the] plaintiff fell" did "not establish[ ] that tenants were unable to use the parking lot for its intended purpose." *Id.* A parking lot is not unfit simply because it is covered with snow and ice. *Id.* at 431. The *Allison* Court however specifically overruled *Teufel v. Watkins*, 267 Mich. App. 425; 705 N.W.2d 164 (2005), "to the extent that *Teufel* held that a lessor's duty to maintain the premises and common areas 'fit for the use intended' under MCL 554.139(1) can *never* include snow and ice removal." 481 Mich. at 438. The *Allison* Court applied the principle of *Benton*, that parking lots and sidewalks are common areas to which the duty to provide reasonable access applies. However, it found that the facts in the case before it did not create a material question of fact that the duty was breached. *Id.*

***3** Plaintiff argues *Benton*, *supra*, should control. In *Benton*, the plaintiff fell on an "icy sidewalk" while walking from his apartment to a parking space in the apartment complex. 270 Mich. App. at 438–439. The plaintiff saw ice patches on some of the complex's sidewalks when he left for work that morning at 6:15 a.m. and noticed the sidewalks were covered with snow when he returned home from work at about 6:00 p.m. *Id.* at 439. The plaintiff fell later that evening on a "four to five feet long" patch of ice while walking "to a different car than the one he had taken to work earlier in the day, thereby causing him to take a different route than the one he had taken previously." *Id.* The sidewalk where the plaintiff fell was not illuminated. The plaintiff complained that the defendant violated its statutory duty under MCL 554.139(1)(a) and general negligence law "to remove snow and ice on the sidewalk in a timely manner." *Id.* The *Benton* Court summarized the conflicting evidence regarding the measures taken both on the day of the incident and on other occasions to ameliorate the effects of winter weather on the common areas. *Benton* applied the principle of *Trentadue v. Buckler Automatic Lawn sprinkler Co.*, 266 Mich. App. 297, 306; 701 N.W.2d 756 (2005), that "[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Benton* concluded, "From the evidence presented, reasonable minds might differ regarding whether defendant's preventive measures, which consisted of salting the sidewalks only once in the morning on the day that plaintiff slipped and fell, constituted reasonable care *in light of the weather conditions that day*." 270 Mich. App. at 445 (emphasis added).

In the context of a (C)(10) motion for summary disposition, our focus is whether a genuine issue of material fact exists regarding whether defendants breached their duty under MCL 554.139(1)(a) to take reasonable measures to address the accumulation of ice and snow on the sidewalks in its complex. *Benton*, 270 Mich. App. at 444. From this record, it appears that plaintiff established a genuine issue of material fact as to whether defendants breached their duty under MCL 554.139(1)(a), and it was therefore error for the trial court to have granted defendants summary disposition. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v. Gen. Motors. Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). Reasonable minds could disagree as to whether defendants took reasonable measures to maintain the sidewalk in a condition that was fit for walking on in light of the weather conditions leading up to plaintiff's fall, the evidence of preventive measures taken to alleviate the dangers of ice and snow accumulation, and the fact that plaintiff did fall.

B. COMMON LAW DUTY

Plaintiff also argues that the trial court erred in finding that no genuine issue of material fact existed as to whether the icy snow-covered sidewalk in front of plaintiff's apartment was effectively unavoidable. In *Benton* the Court held the "open and obvious danger doctrine cannot bar a claim against a landlord for violation of the statutory duty to maintain the interior sidewalks in a condition fit for the use intended under MCL 554.139(1)(a)." 270 Mich. App. at 438. In other words, "if defendant breached its duties under MCL 554.139, defendant would be liable to plaintiff even if the ice on the sidewalk was open and obvious." *Id.* at 441. Because we conclude that plaintiff demonstrated a genuine issue of material fact under MCL 554.139, it is unnecessary for this Court to address the question of whether the icy patches on the sidewalk were open and obvious or effectively unavoidable. See *Id.* at 445 ("In light of our holding that the open and obvious danger doctrine does not bar plaintiff's claim against defendant for violating its statutory obligation under MCL 554.139(1)(a), we need not address plaintiff's remaining issues on appeal.").

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

O'Brien, P.J. (dissenting ).

I respectfully dissent. The majority concludes that the trial court erred in granting defendants' motion for summary disposition because a question of fact exists as to whether the walkway at issue was fit for its intended use under MCL 554.139(1)(a), explaining, essentially in full, as follows:

> ***4** Reasonable minds could disagree as to whether defendants took reasonable measures to maintain the sidewalk in a condition that was fit for walking on in light of the weather conditions leading up to plaintiff's fall, the evidence of preventative measures taken to alleviate the dangers of ice and snow accumulation, and the fact that plaintiff did fall.

I disagree.

In *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 423; 751 N.W.2d 8 (2008), a "[p]laintiff fractured his ankle during a fall when he was walking on one to two inches of accumulated snow in the parking lot of his apartment complex." Our Supreme Court, recognizing that MCL 554.139(1)(a) requires that lessors "ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access the parking spaces, and that tenants have reasonable access to their parked vehicles," concluded "that there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles." *Id.* at 429–430. Consequently, the Supreme Court held, "plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as matter of law." *Id.* at 430. It then continued, explaining as follows:

> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot being fit for its intended purpose. [*Id.*]

In this case, while plaintiff did present more evidence in this case than the plaintiff in *Allison*, the value of the evidence presented in this case and in *Allison* is the same—seemingly ordinary ice and snow accumulation on a winter day. *Allison*, 481 Mich. at 430 ("Plaintiff's allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that plaintiff fell."). Consequently, while the walkway at issue in this case was not necessarily maintained in an ideal condition, there is no evidence, at least in my view, establishing that the seemingly ordinary ice and snow accumulation was anything more than merely inconvenient. Therefore,

plaintiff's claim under MCL 554.139(1)(a) must fail as a matter of law. *Id.* [1]

**All Citations**

Not Reported in N.W.2d, 2017 WL 2569140

Footnotes

1 Defendant MMC of Ypsilanti Inc. was voluntary dismissed on September 15, 2014. Defendants Anderson Villas Management Company and Anyl Management Company were voluntary dismissed on December 2, 2014.

1 I recognize that there is some disagreement as to whether the decision that I would reach here is inconsistent with this Court's opinion in *Benton v. Dart Props*, 270 Mich. App. 437; 715 N.W.2d 335 (2006). However, as I have explained before, I am of the view that my decision is both consistent with and required by our Supreme Court's decision in *Allison*. See, e.g., *Hendrix v. Lautrec, Ltd*, unpublished opinion of the court of Appeals, issued October 27, 2016 (Docket No. 328191) (O'BRIEN, J., *concurring in part and dissenting in part* ).

# EXHIBIT

# 6

2012 WL 3854788
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

John C. DOUGHERTY, Plaintiff–Appellant,
v.
NYKEL–SOMERSET MANAGEMENT, LLC, and Somerset Apartments, LLC, Defendants–Appellees.

Docket No. 303910.
|
Sept. 4, 2012.

Oakland Circuit Court; LC No.2010–111126–NO.

Before: GLEICHER, P.J., and M.J. KELLY and BOONSTRA, JJ.

**Opinion**

PER CURIAM.

***1** In this suit for damages arising from a slip and fall, plaintiff John C. Dougherty appeals by right the trial court's order granting defendant Nykel–Somerset Management, LLC and defendant Somerset Apartments, LLC's motion for summary disposition. On appeal, we conclude that Somerset failed to present evidence that, even if left unrebutted, would establish that it had the right to summary disposition in its favor. Because Somerset failed to establish a ground for dismissing any of Dougherty's claims, the trial court erred when it granted Somerset's motion as to each claim. For these reasons, we reverse and remand for further proceedings.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Dougherty lived in an apartment on property owned by Somerset Apartments and managed by Nykel–Somerset Management (collectively Somerset). He testified at his deposition that in February 2008 he left his apartment with his wife in the midafternoon. When he left that day, the sidewalk that he routinely used to get to his car was clear. He said that he went to the mall with his wife and that they returned at approximately 7 p.m. Dougherty returned to his apartment by the same sidewalk. At some point while walking along that sidewalk, he slipped on a patch of ice, fell, and was injured.

Dougherty sued Somerset for damages arising from his fall in June 2010. Dougherty alleged that he fell on black ice, which "could not be detected upon casual observation and inspection" because the area of the sidewalk in question was "inadequately lit." He further alleged that he did not notice the ice until after he fell. Dougherty alleged that he was entitled to recover under four separate theories: ordinary negligence, breach of the contractual duty imposed under MCL 554.139(1)(a), breach of implied or quasi contract, and nuisance.

In February 2011, Somerset moved for summary disposition under MCR 2.116(C)(10). It alleged that it was entitled to summary disposition because Dougherty could not establish that the sidewalk's condition was unreasonably dangerous or that any breach of duty on its part caused his injuries. It further alleged that Dougherty should have noticed the ice and avoided it and that Dougherty could not establish that the sidewalk was not fit for its intended purpose under MCL 554.139.

The trial court determined that Somerset was entitled to summary disposition and dismissed all of Dougherty's claims in May 2011.

This appeal followed.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Dougherty argues on appeal that the trial court erred when it determined that there were no genuine issues of material fact on his claims and dismissed them under MCR 2.116(C)(10). 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).

### B. MOTIONS UNDER MCR 2.116(C)(10)

  

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v. Rozwood,* 461 Mich. 109, 120; 597 NW2d 817 (1999). A party may be entitled to summary disposition if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact...." MCR 2.116(C)(10). The moving party has the initial burden to demonstrate that it is entitled to summary disposition. *Barnard Mfg,* 285 Mich.App at 369. It must specifically identify the issues to which it believes there is no genuine issue as to any material fact. *Id.,* quoting MCR 2.116(G)(4). And it must support its motion with affidavits, depositions, admissions, or other documentary evidence that, if left unrebutted, would establish its right to summary disposition. *Barnard Mfg,* 285 Mich.App at 369–370. If it properly supports its motion, the burden shifts to the non-moving party to establish that a disputed fact exists. *Id.* at 370, citing *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). However, "[i]f the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion." *Barnard Mfg,* 285 Mich.App at 370.

***2** In this case, the transcript for the hearing on Somerset's motion for summary disposition is apparently missing. However, because this Court reviews such motions de novo to determine whether the moving party was entitled to relief, it is unnecessary for this Court to consider the trial court's analysis. Further, there is no indication that the trial court considered evidence or issues beyond that raised by the parties in their briefs on the motion for summary disposition. See *id.* at 380 n 8. As such, we shall examine anew the parties' submissions to the trial court on Somerset's motion and determine whether Somerset was entitled to relief under MCR 2.116(C)(10).

## C. COMMON LAW CLAIMS

In its motion, Somerset first argued that it was entitled to summary disposition on Dougherty's common law claims because Dougherty had no evidence that the alleged condition was "unreasonably dangerous." In support of this position, it noted that Dougherty testified that he did not complain about the ice to Somerset and that he knew of no other person who had fallen or complained to Somerset. [1] Somerset also wrote in its brief in support of its motion that it "avers [that] it has never received any complaint about the area from anyone before [Dougherty] allegedly fell." [2] It then concluded that "one would expect a series of complaints or reports of accidents from tenants if an unreasonably dangerous condition existed on their sidewalk that they use everyday."

Somerset's allegations and evidence were insufficient to establish that there was no factual dispute with regard to the sidewalk's condition. We agree that a plaintiff alleging a premises liability claim has the burden to prove that the premises had a dangerous condition and that the condition posed an unreasonable *risk of harm.* See *Stitt v. Holland Abundant Life Fellowship,* 462 Mich. 591, 597; 614 NW2d 88 (2000) (listing the elements of the duty owed by the possessors of land to their invitees). Plaintiffs do not, however, have to prove in every case that the condition was "unreasonably dangerous"; a plaintiff may do so to establish an exception to the rule that a premises possessor has no duty to rectify or warn about an open and obvious danger. See *Lugo v. Ameritech Corp, Inc,* 464 Mich. 512, 517; 629 NW2d 384 (2001).

Moreover, assuming that Somerset was merely referring to the unreasonableness of the risk, Somerset had to present substantively admissible evidence that, if believed, established that the ice and lighting at issue did not pose an unreasonable risk of harm in order to warrant summary disposition under this theory. See *Bertrand v. Alan Ford, Inc,* 449 Mich. 606, 624–625; 537 NW2d 185 (1995). But Somerset did not present any evidence concerning the conditions actually at issue; it merely presented evidence that Dougherty did not complain about the ice before his fall and was not *aware* of anyone else who had complained about the ice or fell on the ice. This evidence might permit an inference that the ice had not existed for a lengthy period of time, but it does not permit an inference that the risk posed by the ice was reasonable. Likewise, this evidence provides no insight as to the state of the lighting, which Dougherty alleged to have contributed to his fall. Because Somerset failed to present any evidence to support its position that the dangerous conditions actually at issue—the ice and poor lighting—did not in fact pose an unreasonable risk, it was not entitled to summary disposition on this basis. *Barnard Mfg,* 285 Mich.App at 370.

***3** Somerset also argued that it was entitled to summary disposition of Dougherty's common law claims because it did not have "a sufficient time to notice and fully correct" the conditions at issue. A premises possessor's

duty extends only to those hazardous conditions about which it knows or that it would discover in the exercise of reasonable care. *Stitt,* 462 Mich. at 597. A party may, however, establish notice by presenting evidence that the hazard has existed for a sufficient length of time that the premises possessor should have had knowledge of it. See *Clark v. Kmart Corp,* 465 Mich. 416, 419; 634 NW2d 347 (2001). [3]

In support of its motion, Somerset cited Dougherty's testimony that he did not have any problem walking the path when he left his apartment some five hours before his return at approximately 7 p.m. He also repeatedly stated that he did not know when the ice formed and did not remember whether or when it might have snowed. Considering the evidence in the light most favorable to Doughtery, see *Maiden,* 461 Mich. at 120, a reasonable jury could infer that the ice formed sometime after Dougherty left, but before he returned at 7 p.m. But this is not enough to establish that the ice existed for a sufficient length of time that Somerset should be deemed to have notice of it. The ice might conceivably have formed just minutes before Dougherty's return and the jury would have to speculate about the exact time that it formed in order to impute knowledge to Somerset, which it may not do. See *Skinner v. Square D Co,* 445 Mich. 153, 164–165; 516 NW2d 475 (1994) (stating that a plaintiff's evidence must support reasonable inferences, not mere speculation).

Nevertheless, although Somerset's evidence showed that it might not have had notice about the ice hazard, Somerset failed to address the state of the lighting for the sidewalk in its motion. Dougherty alleged that he did not see the ice because—in part—the lighting was inadequate; thus, even if Somerset's evidence established that it did not know about the ice and could not have discovered the existence of the ice in the exercise of reasonable care, it would not be entitled to summary disposition on the ground that it did not have notice of the hazardous condition. See *Allen v. Owens–Corning Fiberglass Corp,* 225 Mich.App 397, 401–402; 571 NW2d 530 (1997) (noting that there may be more than one proximate cause of an injury and stating that when "a number of factors contribute to produce an injury, one actor's negligence will be considered a proximate cause of the harm if it was a substantial factor in producing the injury."). Somerset could still be liable if it knew or should have known about the poor lighting and the lighting played a substantial factor in Dougherty's fall.

Dougherty submitted his wife's affidavit in response to Somerset's motion. In her affidavit, she stated that it snowed in the morning and evening and that the temperatures got progressively colder throughout the day. She also averred that she viewed the walkway where her husband fell the next morning and noticed that it was covered with black ice. Finally, she stated that she was with her husband at the time of his fall and that the ice was not noticeable because it was dark "and the only light in the area at that time was a single light located in the shade of a large evergreen tree." Dougherty also testified that the only light in the area did not light the sidewalk because it was weak—not much more than a 60 or 100 watt light—and was obscured by an evergreen tree.

***4** From this evidence, a reasonable jury could infer that precipitation coupled with falling temperatures throughout the day caused ice to form in the evening hours. In addition, the evidence that the only light was weak and obscured by a large evergreen tree permits an inference that Somerset either created the poor lighting condition by placing an inadequate light source in the shade of a tree or should have known that the light source had become inadequate as a result of the tree's growth over time. See *Clark,* 465 Mich. at 419 (stating that a premises possessor is liable for harms caused by a dangerous condition that he or she created or where the hazard has existed for a sufficient length of time that he or she should have had knowledge of it); *Hulett v. Great Atlantic & Pacific Tea Co,* 299 Mich. 59, 66–67; 299 NW 807 (1941) ("Defendant could not by its own act create a hazardous condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous condition created by defendant itself is inferred."). Moreover, Somerset was on notice that, in the event that ice formed, its tenants might be unable to see the ice on casual inspection because of the poor lighting. See *Keech v. Clements,* 303 Mich. 69, 74; 5 NW2d 570 (1942) (stating that the premises possessor was assumed to be aware of the poor lighting in its vestibule and assumed to know that snow would get tracked into the vestibule and pose a danger in such a darkened space). As such, if Somerset had notice that its lighting was inadequate to illuminate the sidewalk, it could be liable for any harms suffered by its tenants as a result, notwithstanding that it had not yet become aware of the specific patch of ice at issue. Consequently, there was a question of fact as

to whether Somerset had actual notice of the defective conditions at issue or had sufficient time to discover the defective conditions.

Somerset also argued that Dougherty's common law claims were barred under the open and obvious danger doctrine. Under that doctrine, a premises possessor generally has no duty to rectify or warn about dangers that are so obvious that an invitee can be expected to discover them. *Lugo,* 464 Mich. at 516. A danger is open and obvious if an ordinary user of average intelligence would notice the danger on casual inspection. *Novotney v. Burger King Corp,* 198 Mich.App 470, 474; 499 NW2d 379 (1993).

Here, there was a clear question of fact as to whether Dougherty could have noticed the hazards at issue on casual inspection. Dougherty testified that he did not see the ice that he slipped on until after his fall and that he could not see it because night had fallen and there was inadequate lighting. Similarly, his wife averred that the ice could not be seen because it was dark and the only light was obscured by a large evergreen tree. Therefore, Somerset was not entitled to the dismissal of Dougherty's common law negligence claim on this ground either.

***5** Somerset failed to establish that there was no genuine issue as to any material fact with regard to Dougherty's ordinary negligence claim. Therefore, the trial court erred when it dismissed that claim.

Somerset similarly failed to establish that it was entitled to summary disposition of Dougherty's nuisance claim. Somerset argued—in its reply brief—that it was not aware of a single case where a court allowed a claim premised on black ice to establish a nuisance in fact. Somerset had the initial burden to establish that it was entitled to the dismissal of Dougherty's nuisance claim and this bald assertion was inadequate to establish that right. *Barnard Mfg,* 285 Mich.App at 369–370. In addition, Somerset argued in passing that the open and obvious danger doctrine barred *all* Dougherty's common law claims, but failed to specifically address Dougherty's nuisance claim. Even if this were sufficient to challenge the viability of Dougherty's nuisance claim and even if the open and obvious danger doctrine applied to nuisances in fact, for the reasons already noted, there is a question of fact as to whether the danger at issue was open and obvious. Therefore, the trial court erred to the extent that it granted summary disposition in favor of Somerset on Dougherty's nuisance claim as well. [4]

## D. STATUTORY DUTY

Somerset also argued in its brief in support of its motion for summary disposition that there was no evidence that it breached its duty under MCL 554.139. Under that statute, a lessor covenants in every lease that "the premises and all common areas are fit for the use intended by the parties" and that it will "keep the premises in reasonable repair." MCL 554.139(1). Somerset contended that a transient condition, such as ice, cannot render a sidewalk unfit under MCL 554.139(1)(a). However, Somerset entirely failed to address whether the failure to maintain proper lighting for the sidewalk rendered it unfit for use. Because Somerset did not present evidence that the sidewalk was fit for its intended use even with allegedly inadequate lighting conditions, Dougherty had no duty to respond to this claim and the trial court should have denied the motion. *Barnard Mfg,* 285 Mich.App at 370.

In any event, Dougherty presented evidence that established that the lighting was so inadequate that it made it difficult for an ordinary user to discover dangerous conditions on the sidewalk when it is dark. From this, a reasonable jury could find that Somerset breached its duty to maintain the sidewalk in a condition fit for its intended use. Consequently, there was a question of fact as to the fitness of the sidewalk and Somerset was not entitled to summary disposition of this claim. MCR 2.116(C)(10).

## E. PROXIMATE CAUSE

Finally, Somerset argued that Dougherty could not establish that Somerset's acts or omissions proximately caused Dougherty's injuries. Specifically, Somerset argued that the evidence showed that the ice "could have formed for any number of reasons ... without any negligence by defendants." That is, Somerset appears to have argued that Dougherty had to present evidence that Somerset contributed to the ice's formation. Somerset also related that the evidence showed—without actually citing any evidence—that Dougherty did not know where the ice came from or how long it had been there. Hence, Somerset maintained, Dougherty could not show that

Somerset engaged in a negligent act that was a substantial factor in bringing about Dougherty's injuries. Contrary to Somerset's implied argument, a plaintiff does not have to show that the premises possessor's acts or omissions contributed to the accumulation of the snow or ice; a premises possessor remains liable for harms caused by its failure to mitigate the danger posed by natural accumulations of snow and ice. See *Quinlivan v. Great Atlantic & Pacific Tea Co, Inc,* 395 Mich. 244, 260–261; 235 NW2d 732 (1975) ("[W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation."). [5]

***6** Moreover, as already explained, there was sufficient evidence to establish a question of fact as to whether Somerset knew or should have known about the inadequate lighting and it was undisputed that it did nothing to rectify that condition. As such, there was evidence that it breached its duty to take reasonable measures to rectify the hazard posed by a poorly lit sidewalk in winter. *Stitt,* 462 Mich. at 597. And it is foreseeable that Somerset's failure to provide adequate lighting on its sidewalk might cause an invitee—such as Dougherty—to slip, fall, and be injured by an unseen hazard, such as ice. Accordingly, a reasonable jury could find that Somerset's acts or omissions proximately caused Dougherty's injuries. *Skinner,* 445 Mich. at 163. Somerset also failed to establish that it was entitled to summary disposition on this basis as well.

## III. CONCLUSION

After reviewing the arguments and evidence that Somerset proffered in support of its motion for summary disposition, we conclude that Somerset failed to establish that there was no genuine issues as to any material facts on any of Dougherty's claims. As such, the trial court erred when it granted Somerset's motion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Dougherty may tax his costs. MCR 7.219(A).

GLEICHER, P.J. (concurring).

I concur with the lead opinion. I write separately to respectfully respond to the legal arguments advanced by the dissent.

Plaintiff alleges that he slipped and fell on a sidewalk sheathed in black ice. A low-wattage incandescent light bulb "located in the shade of a large evergreen tree" poorly illuminated the area. Plaintiff contends that the sidewalk's inadequate lighting eliminated his ability to detect the ice. The lead opinion concludes that a jury should decide whether defendants breached their statutory duty to maintain the sidewalk in a manner "fit for the use intended by the parties," MCL 554.139(1)(a), or their common law duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the premises, or both.

The dissent posits that plaintiff's failure to produce evidence "that he or any other tenant had ever informed defendant[s] of a problem with either ice or the lighting" supports summary disposition in defendants' favor. *Post* at 1. According to the dissent, defendants bore no "duty to inspect the premises on a regular basis to determine if any defects exist, but only ... to repair any defects *brought to his attention* or found by *casual inspection* of the premises." *Post* at 4 (emphases in original). In my view, the dissent misapprehends the constructive notice doctrine and its application to defendants' statutory and common-law duties.

A landlord's statutory obligation under MCL 554.139 encompasses the duty to maintain common areas in a condition "fit for the use intended by the parties." *Allison v. AEW Capital Mgt, LLP,* 481 Mich. 419, 425; 751 NW2d 8 (2008). This statutory duty is greater than the duty owed to invitees under common-law premises liability principles. See *Jones v. Enertel, Inc,* 467 Mich. 266, 267; 650 NW2d 334 (2002). The parties agree that the sidewalk on which plaintiff fell constitutes a common area. "[T]he intended use of a sidewalk is walking on it." *Benton v. Dart Props, Inc,* 270 Mich.App 437, 444; 715 NW2d 335 (2006). Tenants walk on common-area sidewalks at all hours of the day and night. The sidewalk on which plaintiff fell provided access to his home. Based on the record evidence, a jury could reasonably conclude that the poorly lit sidewalk covered in ice was unfit for the use intended.

***7** Relying on *Raatikka v. Jones,* 81 Mich.App 428, 430; 265 NW2d 360 (1978), the dissent asserts that because defendants had no obligation to search for defects by regularly inspecting the premises, notice of a dangerous condition cannot be imputed. *Post* at 3. I believe the dissent misconstrues *Raatikka.* In that case, this Court held that "the landlord was under a duty to repair all defects of which he knew *or should have known.*" *Raatikka,* 81 Mich.App at 430 (emphasis added). That a landlord's duty does not include regular inspections of the premises does not absolve the landlord of the duty to correct readily observable dangers. Similarly, the common law requires a landlord to "take reasonable care to know the actual conditions of the premises and either make them safe or warn the invitee of dangerous conditions." *Kroll v. Katz,* 374 Mich. 364, 373–374; 132 NW2d 27 (1965).

Plaintiff testified that only a low-wattage bulb, dimly appearing through the branches of a large evergreen tree, illuminated the sidewalk leading to his apartment. His testimony stands unrebutted in this record. This evidence enables a jury to reasonably conclude that defendants knew or should have known that the sidewalk leading to plaintiff's apartment was poorly lit due to both the wattage of the bulb defendants installed and the condition of the tree.

In *Conerly v. Liptzen,* 41 Mich.App 238; 199 NW2d 833 (1972), this Court recognized that the landlord's knowledge of the "actual conditions" of the premises requires adequate inspection to discover latent dangers:

> "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, *but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.*" [*Id.* at 241–242, quoting Prosser, Torts (3d ed), § 61, pp 402–403 (emphasis added).]

Indisputably, an invitor's duty encompasses reasonable inspection intended to detect dangerous conditions on the premises. Accordingly, defendants owed plaintiff the duties to (1) inspect the lighting conditions of common areas; (2) discern that the low-watt bulb covered by tree branches cast inadequate light; and (3) replace the light fixture or bulb and trim the branches. Defendants' failure to discover the inadequately lit sidewalk tends to *prove* their negligence rather than excuse it.

Nor does the absence of a prior complaint of inadequate lighting relieve defendants of their legal duties as invitors. The dissent contends that "[n]o evidence was set forth that any maintenance person inspected the building and noticed a lighting issue prior to plaintiff's fall." *Post* at 1–2. But the constructive notice doctrine contemplates liability if a defendant *should have known* of a dangerous condition on the premises, and does not shield a premises owner or possessor from liability for injury where the premises owner or possessor itself unreasonably creates, tolerates or causes a dangerous condition. *Hampton v. Waste Mgt of Mich, Inc,* 236 Mich.App 598, 604–605; 601 NW2d 172 (1999). And "[g]enerally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v. Exxon Mobil Corp,* 477 Mich. 983, 984; 725 NW2d 455 (2007), citing *Kroll,* 374 Mich. at 371.

***8** Moreover, a finding of constructive notice often depends on the involved lapse of time. The longer a defect is present the *stronger* the evidence of constructive notice. An invitor is liable when an unsafe condition "is known to the storekeeper or *is of such a character or has existed a sufficient length of time that he should have knowledge of it.*" *Carpenter v. Herpolsheimer's Co,* 278 Mich. 697, 698; 271 NW 575 (1937) (emphasis added). "Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it." *Whitmore v. Sears, Roebuck & Co,* 89 Mich.App 3, 8; 279 NW2d 318 (1979). "[C]onstructive notice arises not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements."

*Kroll,* 374 Mich. at 372. Given that trees grow slowly and defendants installed the light bulb, a jury may reasonably infer that the poor lighting condition should have been readily apparent to defendants, and likely existed for a considerable period of time before plaintiff fell.

In summary, uncontradicted evidence supported that plaintiff's fall was the product of ice rendered invisible due to darkness. While defendants had no actual notice of the ice, they knew or should have known that after normal business hours during the winter months, the sidewalks could become slippery. A jury could reasonably conclude that defendants also knew or should have known that absent adequate lighting, tenants attempting to enter their apartments would have difficulty recognizing and protecting themselves against the presence of ice. Given these circumstances, the trial court erred by granting summary disposition to defendants.

BOONSTRA, J (dissenting).

***8** In this slip-and-fall case, the majority reverses the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Because the record reflects a lack of notice to defendants of any dangerous condition, I respectfully dissent.

## I. BASIC FACTS

Plaintiff's complaint arises out of injuries sustained by plaintiff when he slipped and fell on an icy sidewalk at an apartment complex owned and operated by defendants. On the day of the accident, plaintiff, a tenant of the apartment complex, left his apartment sometime around 2:00 or 3:00 p.m. to go to a shopping mall. Plaintiff testified that when he left the apartment, it was cold and overcast, but he did not remember it snowing, raining, or sleeting. There was no snow or ice on the sidewalk, although there was snow on the ground on both sides of the sidewalk. Evidence was presented that light snow fell on the morning of the incident and again later that evening (after plaintiff's fall), and that the temperature, which was above freezing for most of the day, became progressively colder. As plaintiff was walking back to his apartment in the evening, he fell on a patch of ice on the sidewalk and suffered injuries, including two broken ribs. At his deposition, plaintiff testified that he did not see the ice before he fell, that the ice completely covered the sidewalk (although he was unsure if it covered the sidewalk completely at the time of his fall or if the ice had started accumulating and had continued to accumulate following his fall), and that the area where he fell was not adequately lit because a nearby light was "located in the shade of" a large evergreen tree. Plaintiff did not produce any evidence that he or any other tenant had ever informed defendant of a problem with either ice or the lighting in the area. Nor was there any evidence that defendant discovered the alleged lighting condition during a "casual" inspection of the building. No evidence was set forth that any maintenance person inspected the building and noticed a lighting issue prior to plaintiff's fall [1]. Plaintiff filed suit, alleging negligence on a premises liability theory, violation of MCL 554.139, nuisance in fact, and breach of implied contract.

## II. LACK OF NOTICE

***9** Plaintiff alleges that defendant owed him both a common-law and statutory duty of care. Plaintiff, as a tenant, was an invitee on defendant's premises. *Royce v. Chatwell Club Apartments,* 276 Mich.App 389, 392 n 2; 740 NW2d 547 (2007). In the context of premises liability claims, "[t]he invitor's legal duty is 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v. Alan Ford, Inc,* 449 Mich. 606, 609; 537 NW2d 185 (1995) (citations omitted). The premises possessor thus owes an invitee a duty to inform him of known dangers, as well as a duty to inspect the premises for reasonable defects. *Kroll v. Katz,* 374 Mich. 364, 373; 132 NW2d 27 (1965). The premises possessor does not, however, owe the invitee a duty to warn him of dangers of which the possessor is unaware and could not have discovered with reasonable care. *Id.* The mere existence of a danger does not establish liability, unless it is of "such a character or of such duration" that the premises possessor would have discovered it in the exercise of reasonable care. *Id.,* quoting Prosser on Torts (2d ed.), p. 459 (emphasis removed).

MCL 554.139 imposes a higher duty on residential landlords than on other invitors. *Benton v. Dart Properties, Inc,* 270 Mich.App 437, 443 n 2; 715 NW2d 335 (2006). "MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition*

to any protection provided by the common law." *Allison v. AEW Capital Mgt, LLP,* 481 Mich. 419, 425; 751 NW2d 8 (2008) (emphasis in original). MCL 554.139(1) provides, in pertinent part, that:

> In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.

The effect of MCL 554.139(1)(a) is to impose a statutorily mandated contractual duty on a lessor of residential premises to keep common areas in a condition fit for their intended use. *Allison,* 481 Mich. at 429. Our Supreme Court has adopted the approach of the Second Restatement of Torts in assessing a lessor's liability to a lessee for a breach the duty imposed by MCL 554.139. *Mobil Oil Corp v. Thorn,* 401 Mich. 306, 312; 258 NW2d 30 (1977), citing 2 Restatement Torts 2d, § 357. Thus, a lessor may be liable in tort for injuries caused to a lessee if the lessor fails to exercise reasonable care in performing his contractual obligation. *Id.*

Importantly, § 357 is clear that a "a contract to keep the premises in safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need for repairs." 2 Restatement Torts 2d, § 357, comment d. Further, statutes that impose new liabilities not found at common law must not be "extended by implication to abrogate established rules of common law." *Rusinek v. Schultz, Snyder & Steele Lumber Co.,* 411 Mich. 502, 508; 309 NW2d 163 (1981) (citation omitted); *In re Black,* 83 Mich. 513, 47 NW 342 (1890). At common law, a lessor is liable for injuries resulting from dangerous conditions on the land of which he knows or should have known. *Bertrand,* 449 Mich. at 609; *Kroll,* 374 Mich. at 373. A landlord is charged with the statutory duty to repair "all defects of which he knew or should have known." *Raatika v. Jones,* 81 Mich.App 428, 430; 265 NW2d 360 (1978). Thus, the common-law requirement of actual or constructive notice to a lessor is also a requirement for the establishment of liability under MCL 554.139(a). See also *Evans v. Van Kleek,* 110 Mich.App 798, 803; 314 NW2d 486 (1981).

***10** The starting point for analyzing both plaintiff's premises liability claim and his claim under MCL 554.139 is therefore notice to the defendant. *Kroll,* 374 Mich. at 373; *Hampton,* 236 Mich.App at 604; *Evans,* 110 Mich.App at 803. If defendant did not create the alleged condition, plaintiff must show that defendant knew about the condition, or should have known about it, and failed to take reasonable measures to prevent the injury. See *Clark,* 465 Mich. at 419. Absent actual or constructive notice of the dangerous condition, a premises possessor cannot be shown to have breached his duty to the injured party, whether an invitee or a lessee, and summary disposition is appropriate. *Derbabian v. S & C Snowplowing, Inc,* 249 Mich.App 695, 706–707; 644 NW2d 779 (2002); *Whitmore v. Sears, Roebuck & Co,* 89 Mich.App 3, 8–10; 279 NW2d 318 (1979).

Constructive notice is notice imposed by law when, although a person did not have actual notice of a dangerous condition, the party should have known of the danger. *Siegel v. Detroit City Ice & Fuel Co,* 324 Mich. 205; 36 NW2d 719 (1949). Constructive notice can be inferred from evidence that the dangerous condition existed for a sufficient length of time or was of such a character that the landowner should have known of its existence. *Clark,* 465 Mich. at 419; 634; *Hampton,* 236 Mich.App at 603–604.

Plaintiff presents no evidence of defendant's actual notice of any icy condition, but rather argues that summary disposition was not appropriate because reasonable minds may differ regarding whether defendant had constructive notice of the icy condition of the sidewalk. I disagree. Viewed in a light most favorable to plaintiff, the evidence did not present a genuine issue of material fact regarding defendant's notice of the accumulation of ice.

No evidence was presented that plaintiff or anyone else had informed defendants of the icy condition before plaintiff's injury. There was also no evidence that anyone else had fallen on the ice before plaintiff's fall. In his deposition testimony, plaintiff admitted that he never complained to defendants about any problem with the sidewalk before his fall. Plaintiff presented no evidence that anyone else had ever complained about the condition of the sidewalk. Plaintiff also failed to present evidence that the icy condition was of such a nature or existed for a sufficient length of time such that defendants should have known of its presence. Plaintiff had walked on the same sidewalk only four to five hours before the incident and had observed no snow or ice on the sidewalk. Plaintiff conceded that he did not know where the ice came from or how long it had been on the sidewalk at the time of his accident. No evidence established that precipitation fell

between the time of plaintiff's walk on the sidewalk four to five hours before the incident and the fall. Although defendant owed plaintiff a duty of care both at common law and by statute, plaintiff failed to show that defendant had actual or constructive notice of the existence of the alleged accumulation of ice, and thus arguably breached that duty.

***11** I disagree with plaintiff's contention that the weather conditions on the day of the incident put defendants on constructive notice of the icy condition of the sidewalk. The circumstantial evidence of local weather conditions favorable to the formation of ice, without more, does not create a reasonable inference that defendants had constructive notice of the specific patch of ice on which plaintiff fell. See *Altairi v. Alhaj,* 235 Mich.App 626, 640; 599 NW2d 537 (1999).

To its credit, the majority correctly notes a lack of any evidence that defendant had received notice of an icy condition, and that to impute notice of the icy condition to defendant, the jury would have to speculate as to exactly when the ice formed, which is impermissible. See also *Skinner v. Square D Co,* 445 Mich. 153, 164–65; 516 NW2d 475 (1994), overruled in part on other grounds in *Smith v. Globe Life Ins Co,* 460 Mich. 446, 455 n 2; 597 NW2d 28 (1999). However, the majority finds a fact question as to whether defendant should have noticed the allegedly defective lighting condition. I disagree that plaintiff has shown that a genuine issue of material fact exists. Plaintiff presented no evidence indicating that the allegedly obscured lighting condition was created by defendants, or that defendant had any actual notice of the condition. Moreover, a landlord does not have a duty to inspect the premises on a regular basis to determine if any defects exist, but only has a duty to repair any defects *brought to his attention* or found by *casual inspection* of the premises. *Raatika,* 81 Mich.App at 430 (emphasis added). Plaintiff produced no evidence that he or anyone else had informed defendant of any lighting condition, or that defendant had discovered the lighting condition during casual inspection.

Additionally, I would not impute constructive notice to defendant of any lighting condition based on the evidence presented. Although trees do not sprout up overnight, I do not find compelling evidence that the "shade of a large evergreen tree" was here of "such a character or of such duration" that defendant would have discovered inadequate lighting in the exercise of reasonable care. *Kroll,* 374 Mich. at 373, quoting Prosser on Torts (2d ed.), p. 459 (emphasis removed). Plaintiff argues only cursorily that the sidewalk was poorly lit; yet the majority has latched onto this bare assertion as a means of resurrecting plaintiff's claim. Plaintiff presented no evidence of *how long* the lighting was allegedly inadequate; thus I cannot find any basis for concluding that defendant should be charged with notice of such inadequacy. Given the dearth of evidence presented by plaintiff on this point, the concurrence posits, without any evidentiary basis whatsoever, that the alleged "poor lighting condition ... *likely* existed for a considerable period of time before plaintiff fell." *Ante* at 3 (emphasis added).

In my view, this kind of judicial conjecture does not serve to create or support a finding of a genuine issue of material fact such as would justify the reversal of the trial court's grant of summary disposition. Although plaintiff's wife testified that the light was "weak," I believe that the chain of inferences that the majority makes from that statement—that defendant may have installed an inadequate bulb, and therefore had notice that as a nearby tree grew (over an unknown period of time) the lighting would be rendered inadequate, such that if ice formed on the sidewalk tenants would be unable to see it, begins to resemble the same sort of impermissible "conjecture" the majority admits would be impermissible for a jury considering the icy patch in isolation. See *Skinner,* 445 Mich. at 164–65.

## III. CONCLUSION

***12** Because plaintiff failed to establish a genuine issue of material fact as to defendants' actual or constructive notice of any allegedly dangerous condition, defendant was entitled to a judgment as a matter of law and the trial court's grant of summary disposition to defendant was proper. MCR 2.116(C)(10); see also *Derbabian,* 249 Mich.App at 706–707.

I would therefore affirm the trial court's grant of summary disposition on both plaintiff's premises liability and statutory violation claims, due to the absence of a genuine issue of material fact regarding defendant's actual or constructive knowledge of the alleged condition.[2] For these reasons, I respectfully dissent.[3]

  

**All Citations**

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Footnotes

1 Although Somerset identified this evidence as coming from Dougherty's deposition, it did not identify the location of that testimony with the required specificity. See *Barnard Mfg,* 285 Mich.App at 380. Nevertheless, for purposes of this appeal, we shall assume that the trial court searched through Dougherty's deposition and considered the testimony. *Id.* at 380 n 8.

2 Somerset did not attach an affidavit to its motion or identify an existing affidavit that was already in the record to support this claim. Merely stating that a party "avers" that a fact is true is insufficient to actually establish that as a fact. See MCR 2.116(G)(3); MCR 2.116(G)(4); MCR 2.116(G)(6); MCR 2.119(B). Therefore, we cannot consider this statement. *Barnard Mfg,* 285 Mich.App at 380–381.

3 Somerset argued that, because the fall occurred after regular business hours, it necessarily could not have remedied the icy condition because it would have had to summon the maintenance crew back to the premises. Although a person who enters onto a merchant's property after regular business hours might not be an invitee, a tenant remains an invitee even when the tenant uses common areas after regular business hours. And Somerset's duty to its invitees, therefore, continued to 7:00 p.m., the time of Dougherty's fall. It would be for the jury to determine whether the arrangements that Somerset made to handle the accumulation of snow and ice after hours were reasonable. See *Moning v. Alfono,* 400 Mich. 425, 438; 254 NW2d 759 (1977) ("While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including ... whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.").

4 We do not mean to suggest that Dougherty's nuisance claim is viable. We have merely recognized that Somerset failed to support its motion for dismissal as required by our court rules. As such, the trial court's decision to dismiss that claim was premature. Nothing within this opinion should be read to preclude Somerset from making a renewed—properly supported—motion for summary disposition, which might then establish its right to relief.

5 Our Supreme Court has never overruled *Quinlivan.* Instead, it has clarified that the duty stated in *Quinlivan* "must be understood in light of this Court's subsequent decisions in *Bertrand[,* 449 Mich. 606 (1995),] and *Lugo[,* 464 Mich. 512 (2001) ]." *Mann v. Shusteric Enterprises, Inc,* 470 Mich. 320, 333 n 13; 683 NW2d 573 (2004).

1 The concurrence suggests that, by virtue of its use of this language, this dissent "misapprehends the constructive notice doctrine." *Ante* at 1, 3. I disagree. It is an undisputed and indisputable fact that there was no evidence of actual notice, which is what this language conveys. That there also was no constructive notice is demonstrated later in this dissent.

2 Because I would find that plaintiff failed to establish a genuine issue of material fact as to defendants' notice of a dangerous condition, it is unnecessary to address, *e.g.,* whether any condition was "open and obvious" (for purposes of a premises liability claim) or whether the sidewalk was "unfit for its intended use" (for purposes of a statutory liability claim).

3 I also would decline to disturb the trial court's dismissal of plaintiff's nuisance in fact claim because (a) plaintiff failed to properly present the issue for appeal by raising it in the statement of his questions presented in his appellate brief, MCR 7.212(C)(5); *Mettler Walloon, LLC v. Melrose Twp,* 281 Mich.App 184, 221; 761 NW2d 293 (2008) (citation omitted), and (b) it was plainly without merit as a matter of law. A nuisance in fact results "where the natural tendency of an act is to create danger and inflict injury on person or property." *Radloff v. State,* 116 Mich.App 745, 756; 323 NW2d 541 (1982), remanded 417 Mich. 894 (1983), on remand 136 Mich.App 457 (1984). Plaintiff argues that defendants allowed a condition to exist that had a natural tendency to create danger. "It is well established that '[t]he gravamen of an action is determined by reading the claim as a whole' and looking 'beyond the procedural labels to determine the exact nature of the claim.' " *Tipton v. William Beaumont Hosp,* 266 Mich.App 27, 33; 697 NW2d 552 (2005) (internal citations omitted). Looking at plaintiff's claim as a whole, plaintiff's allegation is that defendant breached their duty to maintain the property in a safe condition. As a result, plaintiff's claim sounds in premises liability, not nuisance. See *James v. Albert,* 464 Mich. 12, 18–19; 626 NW2d 2001 (noting that when an injury arises out of a condition of the land, rather than the activity alleged to cause the condition, the resulting action is a premises liability action). I therefore would affirm the trial court's grant of summary disposition to defendant on plaintiff's nuisance claim. MCR 2.116(C)(10). For the same reason, I also would affirm the trial court's grant of summary disposition to defendant on plaintiff's breach of implied contract claim, which plaintiff in any event appears to have abandoned, see *Silver Creek Twp v. Corso,* 246 Mich.App 94, 99; 631 NW2d

346 (2001). Neither of those claims should be revived based upon the majority's errant decision to reinstate plaintiff's premises liability and statutory claims.

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