STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Karen M. Fort Hood, the Hon. Elizabeth L. Gleicher and the Hon. Colleen A. O'Brien

Supreme Court No. _____

MAE HENDRIX,

Court of Appeals No. 328191

Plaintiff-Appellee,

Lower Court No. 14-142087-NO

v

LAUTREC, LTD.,

Defendant-Appellant.

_____/

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DEFENDANT LAUTREC LTD.'S APPLICATION FOR LEAVE TO APPEAL

Dated: January 13, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

COURT RULES

STATEMENT OF JUDGMENT APPEALED FROM

Defendant, Lautrec Ltd., seeks leave to appeal from the Court of Appeals' decision of October 27, 2016, reversing the dismissal of Plaintiff's claim under the Landlord-Tenant Act, MCL 554.139(1)(a), and remanding to the trial court for further proceedings (Court of Appeals Decision; Exhibit A). Judge O'Brien dissented from that result and would have affirmed the trial court's dismissal of Plaintiff's claim under MCL 554.139(1)(a). Defendant timely moved for reconsideration in the Court of Appeals, which was denied in an Order entered December 7, 2016 (Exhibit B). Judge O'Brien would have granted reconsideration (Exhibit B).

QUESTION PRESENTED

I. DID THE COURT OF APPEALS CLEARLY ERR BY FAILING TO FOLLOW *ALLISON V AEW CAPITAL MGMT, LLP*, WHICH DEFINES A LESSOR'S DUTY RELATING TO SNOW AND ICE ON A PARKING LOT, WHERE PLAINTIFF SLIPPED ON A DRIVEWAY WHICH IS FUNCTIONALLY EQUIVALENT TO A PARKING LOT?

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

The Court of Appeals (Judges Gleicher and Fort Hood) said "No."

STATEMENT OF FACTS

Plaintiff filed a Complaint in this matter claiming that she slipped and fell on ice on the morning of March 1, 2013, while carrying a grocery bag into her residence located at 5460 Bentley Rd., West Bloomfield, Michigan (Exhibit C; Complaint). Plaintiff alleged that Defendant Lautrec, Ltd. was the owner of the premises, while Plaintiff was a tenant (Exhibit C, ¶¶ 4, 5). Plaintiff asserted claims of premises liability, and liability under MCL 554.139 for failure to keep the premises and common areas fit for their intended use (Exhibit C, ¶¶ 9-12).

On the morning of the accident, Plaintiff and her husband entered the garage where their vehicle was parked through a door on the side of the garage that is a short distance from the front door to their apartment (Exhibit D, pp 29, 31, 32; deposition of Mae Hendrix). They drove to the bank and then went grocery shopping (Exhibit D, p 27). When they returned home, Mr. Hendrix parked the car in the driveway instead of pulling it into the garage (Exhibit D, p 35). After exiting the vehicle, Plaintiff opened the rear passenger door and removed some groceries from the car (Exhibit D, pp 37-38). She walked behind the car and up the driveway toward the house (Exhibit D, p 38). She then slipped and fell (Exhibit D, p 38). Plaintiff marked the spot where she fell on a photograph (Exhibit E; see photo marked Exhibit 9).

The photographs, taken shortly after the incident while an ambulance was still present, show visible snow patches on the driveway (Exhibit E). The weather on the day of the accident was cold (Exhibit D, p 32). Plaintiff testified that snow was on the ground (Exhibit D, p 33). Viewing the photographs of the scene, she testified that there were patches of visible snow and ice (Exhibit D, pp 61-62). She also testified that the ground appeared damp and had a glossy appearance with a sheer sheen on the driveway (Exhibit D, pp 57, 59, 62).

Plaintiff testified that it was her belief that water came through a downspout located by the garage door, and froze causing her to slip and fall (Exhibit D, p 65). She testified further that she had lived at the apartment since 1996 and knew of the downspout since that time (Exhibit D, p 65). She was aware of the purpose of the downspout and of the possibility of ice formation (Exhibit D, pp 65-66).

Plaintiff's husband also testified that on the date of the incident there was snow on the ground and the weather was cold (Exhibit F, p 19; Deposition of William Hendrix). He noticed snow and visible ice on the driveway when he was walking in after the grocery trip and prior to Plaintiff's fall (Exhibit F, pp 26, 38). He testified that the ice had formed from water running out of the downspout and accumulating in an indentation in the pavement (Exhibit F, p 27). Mr. Hendrix had no difficulty observing that water that had run out of the downspout had accumulated and frozen over (Exhibit F, p 27). Mr. Hendrix carried grocery bags from the car to the door without incident prior to Plaintiff's fall (Exhibit F, pp 25-26). Also after the accident, Mr. Hendrix and some maintenance workers carried the remaining groceries into the apartment without incident (Exhibit F, p 40).

Defendant moved for summary disposition, arguing that Plaintiff's claim under MCL 554.139 must fail because the driveway was fit for its intended purpose (Defendant's Motion for Summary Disposition, p 9). Defendant noted that pursuant to *Allison v AEW Capital Management*, 481 Mich 419, 429-430; 751 NW2d 8 (2008), the statute does not require a lessor to maintain common areas "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 its intended use (Defendant's Motion for Summary Disposition, p 9). Defendant further argued that Plaintiff's premises liability claim was barred by the open and obvious doctrine, where Plaintiff, a long-time

Michigan resident, observed multiple indicia of a potentially hazardous condition on the date of the incident, including observing visible patches of ice and snow on the driveway and a sheen on the surface of the driveway (Defendant's Motion for Summary Disposition, p 16). Finally, Defendant argued that the allegedly dangerous condition had no special aspects so as to remove it from the operation of the open and obvious doctrine (Defendant's Motion for Summary Disposition, p 18).

Plaintiff responded that because the driveway functioned as both a place to park vehicles and the only source of ingress and egress for the Plaintiff's apartment unit, Defendant was required to maintain the driveway in a condition fit both for driving and traversing to and from the unit (Plaintiff's Response to Defendant's Motion for Summary Disposition, p 6). Plaintiff characterized the driveway as a "mixed use common area" (Plaintiff's Response to Defendant's Motion for Summary Disposition, pp 5, 8). Plaintiff argued that where the driveway was not salted "despite the known problem with water pooling at freezing on the driveway in the depression beneath the downspout," it was not fit for its intended purpose of serving as a means of ingress and egress (Plaintiff's Response to Defendant's Motion for Summary Disposition, p 8). Plaintiff further argued that the open and obvious doctrine was not applicable because Plaintiff slipped on "black ice" during weather conditions which did not alert her that the driveway could be icy or slippery (Plaintiff's Response to Defendant's Motion for Summary Disposition, pp 9, 12). Plaintiff also argued that even if the condition was open and obvious, the claim should not be barred because the condition had special aspects that would remove it from the operation of the open and obvious doctrine (Plaintiff's Response to Defendant's Motion for Summary Disposition, p 13).

Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition argued that the primary purpose of a driveway is driving, and that it had to be fit only

for this purpose (Defendant's Reply to Plaintiff's Answer to Defendant's Motion for Summary Disposition, p 3).

At a hearing held on June 24, 2015, the trial court issued an opinion from the bench. With respect to Plaintiff's claim under MCL 554.139, the Court ruled that "plaintiff failed to present evidence establishing that plaintiff was not able to use the driveway as intended, that is, as a mixed use" (Tr. 6/24/15, p 10). The trial court also found that the condition that caused Plaintiff's fall was open and obvious and would have been discovered by an ordinary person upon casual inspection (Tr. 6/24/15, p 9). The Court rejected Plaintiff's claim that the condition had special aspects that removed it from the operation of the open and obvious doctrine, noting that "plaintiff failed to establish stepping on the patch of ice was unavoidable." (*Id.*, pp 9-10.)

Plaintiff appealed to the Michigan Court of Appeals as of right. The appellate panel, in an unpublished opinion by Judges Gleicher and Fort Hood, and in a separate opinion by Judge O'Brien, concluded that summary disposition was properly granted with respect to the claim of common-law premises liability, because the hazard in question was open and obvious, and had no special aspects that would remove it from the operation of the open and obvious doctrine (Exhibit A, pp 2-4, Opinion by Judge O'Brien, p 1). Rejecting Plaintiff's contention that the danger was "effectively unavoidable," the panel specifically noted that Plaintiff had an alternate route and was not required to walk across the allegedly icy driveway: "Hendrix had an alternate route she could have traversed to her apartment. Hendrix could have walked through her garage and used the rear-facing door to access the sidewalk to her apartment. She was not required to walk across the icy driveway." (Exhibit A, p 4.)

With respect to Plaintiff's claim that Defendant failed to maintain the driveway in a condition fit for its intended use, as required by MCL 554.139(1)(a), the majority found a genuine

issue of material fact (Exhibit A, p 4). The majority first noted that the parties agreed that the connected row of driveways was a common area (Exhibit A, p 4). The majority acknowledged this Court's decision in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), as follows:

> In *Allison*, 481 Mich at 429, the Supreme Court determined that the primary intended use of a parking lot is to park cars. Therefore, the landlord has a duty to maintain the parking lot in a condition fit for the parking of cars. "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," the Supreme Court concluded. *Id.* at 430.

(Exhibit A, p 4.) However, the majority went on to distinguish *Allison, supra,* on the grounds that a driveway is not a parking lot, but that rather in this case, the connected driveways "are also intended for pedestrian access to the garages and pedestrian access to the residential units" and in this sense "are more akin to sidewalks" (Exhibit A, p 4). Citing *Benton v Dart Props, Inc*, 270 Mich App 437, 444; 715 NW2d 335 (2006), the majority noted that "a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use" (Exhibit A, p 4). The majority further noted that "sidewalks are intended for the use of pedestrians, and they are entitled to walk upon them, even if the sidewalk bears defects" (Exhibit A, p 4) (internal quotation and citation omitted). In finding a genuine issue of material fact as to whether Defendant breached its statutory duty "to maintain the driveway in a manner befitting its intended use," the majority wrote:

> The photos demonstrate that a substantial portion of the driveway directly abutting Hendrix's driveway was covered in ice. The ice formed when water flowing from a downspout connected to the garage pooled in an area of broken and depressed concrete before freezing. This ice created a dangerous condition making the driveway unfit for pedestrian use. Because the record supports that

> pedestrian travel constituted an "intended use" of the connected driveways, we reverse the dismissal of Hendrix's statutory claim and remand for continued proceedings.

(Exhibit A, p 4.)

Judge O'Brien dissented from the majority's analysis of Plaintiff's claim under the Landlord-Tenant Act, MCL 554.139(1)(a). She opined that *Allison, supra,* should control this case (Exhibit A, Opinion by Judge O'Brien, p 1). Judge O'Brien found the panel's factual distinguishing of *Allison, supra,* unpersuasive, reasoning that a parking lot, like a driveway, was also used for pedestrian access:

> [H]ere and in *Allison,* there can be no dispute that the pathway at issue, whether it be through a parking lot or through a driveway, was "intended for pedestrian access to the garages and pedestrian access to the residential units." [quoting the majority opinion]. While it may be true that parking lots and driveways have different "primary" uses, I do not think it can be disputed that both are "intended for pedestrian access to garages and pedestrian access to residential units." Accordingly, I would affirm.

(Exhibit A, Opinion by Judge O'Brien, p 1.)

Defendant now seeks leave to Appeal to this Honorable Court.

LAW AND ARGUMENT

Standard of Review

Two standards of review are applicable to this appeal. The first level of review asks whether one of the grounds specified by court rule for the intervention of this Honorable Court is present. Pursuant to MCR 7.305(B), an application for leave to appeal must show at least one of several grounds set forth by that court rule. The following grounds warrant this Court's intervention in the instant case:

> (1) the issue involves a legal principle of major significance to the state's jurisprudence;
>
> . . .
>
> (5) in an appeal of a decision of the Court of Appeals,
>
> (a) the decision is clearly erroneous and will cause material injustice, or
>
> (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals;

MCR 7.305(B)(1), (5). The case at bar involves a question of landlord liability under MCL 554.139(1)(a) for driveway slip and falls. As a question that will certainly recur, it is of major significance to the state's jurisprudence. The decision of the Court of Appeals majority is both clearly erroneous and in conflict with a Supreme Court decision, because it failed to follow a Michigan Supreme Court case, *Allison, supra,* that was clearly controlling. For all of the reasons set forth in this Application, *infra,* a driveway is functionally equivalent to a parking lot – indeed even more than a parking lot, is designed primarily for the passage and use of vehicles. The *Allison* Court has already determined a lessor's duty with respect to snow and ice on a parking lot. That holding necessarily applies to a driveway as well. In *Allison, supra,* this Court held that a parking lot covered in snow and ice is not unfit for its intended purpose. *Id.* at 430. The application of that holding to this case would have required the affirmance of the trial court's dismissal of Plaintiff's claim under the Landlord-Tenant Act, MCL 554.139(1)(a). The panel's clearly erroneous failure to follow *Allison, supra,* will result in manifest injustice to Defendant, as Defendant will be required to defend against, and be subject to potential liability in a case in which it has no liability as a matter of law.

The second standard of review is that applicable to a summary disposition ruling. A trial court's decision to grant or deny summary disposition is reviewed de novo. *Titan Ins Co v Hyten,* 491 Mich 547, 553; 817 NW2d 562 (2012).

I. THE COURT OF APPEALS CLEARLY ERRED BY FAILING TO FOLLOW *ALLISON V AEW CAPITAL MGMT, LLP,* WHICH DEFINES A LESSOR'S DUTY RELATING TO SNOW AND ICE ON A PARKING LOT, WHERE PLAINTIFF SLIPPED ON A DRIVEWAY WHICH IS FUNCTIONALLY EQUIVALENT TO A PARKING LOT.

This case concerns a landlord's duty with respect to an icy condition of a driveway. The source of this duty is MCL 554.139, which 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 intended use by the parties.

A. The *Allison* Decision

In *Allison v AEW Capital Management, LLP,* 481 Mich 419; 751 NW2d 8 (2008), this Court considered the application of this statute to a parking lot. The Court first concluded that a parking lot was a "common area" under MCL 554.139(1)(a), which the lessor had a contractual duty to keep in a condition "fit for the use intended by the parties." *Id.* at 429.[1] In *Allison*, the plaintiff fell while walking on one to two inches of snow in his apartment complex parking lot. *Id.* at 423. After the fall, he observed ice on the ground where the snow had been displaced. *Id.* Plaintiff sued the apartment complex, alleging, inter alia, breach of the statutory covenant to maintain and repair the premises. *Allison, supra*, 481 Mich at 423. The trial court granted

[1] The majority in this case also treated the driveway area in question as a "common area" noting that "[t]he parties agree that the connected row of driveways is a common area" (Exhibit A, p 4). See Defendant's Motion for Summary Disposition, p 8, and Plaintiff's Response to same (Brief), p 8.

summary disposition for the Defendant. *Id.* The Court of Appeals reversed, holding that the intended uses of a parking lot were the parking of vehicles and walking; and that a parking lot covered in ice was not fit for the purpose of walking. *Allison v AEW Capital Management, LLP (On Reconsideration)*, 274 Mich App 663, 670-671; 736 NW2d 307 (2007).

This Court took a more limited view of the purpose of a parking lot, making clear that its primary purpose is the parking of vehicles, and walking upon the lot is secondary to that purpose:

> We agree that the intended use of a parking lot includes the parking of vehicles. A parking lot is constructed for the primary purpose of storing vehicles on the lot. . . . 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. 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.

Allison, supra, 481 Mich at 429. Upon the facts presented, the Supreme Court found that "[t]he Court of Appeals erred in concluding that . . .the parking lot in this case was unfit simply because it was covered in snow and ice." *Id.* at 430 (emphasis added). *Id.* Even though the plaintiff in *Allison, supra*, slipped on ice while walking to his car, the Court held that he failed to show that the condition of the parking lot precluded access to the vehicle. *Id.*

B. This case is indistinguishable from *Allison* because a driveway is functionally identical to a parking lot

The holding of *Allison, supra* – that the primary use of a parking lot is for the storage of vehicles and that it is fit for that purpose so long as the tenants are able to park their vehicles in the lot and have "reasonable access" to their vehicles – unavoidably applies with at least as much force to a driveway. A driveway, as the name suggests, is primarily intended for the driving of vehicles. It is a means by which a vehicle travels from the road into the garage. Although a

driveway need not be used for the parking or storage of vehicles, it may be, and was in this case. The primary purpose of a driveway is therefore the transit, and possibly, the parking of vehicles.[2] Thus, so long as a driveway permits the parking and transit of vehicles and allows "reasonable access" to those vehicles, it is fit for its intended use. Plaintiff argued in the Court of Appeals that the driveway was the only source of ingress and egress from a vehicle parked in the driveway. But this argument fails to distinguish the instant case from *Allison*, since it is equally true that one must traverse a parking lot in order to access one's vehicle parked in the parking lot.

The majority's reasoning that the driveways in this case were "more akin to sidewalks" than to a parking lot (Exhibit A, p 4), is not consistent with common understanding or with the record in this case. Looking first to the record, the driveway in this case need never have been used for pedestrian access to or egress from the vehicle, because the vehicle could have been parked in the garage, allowing Plaintiff to exit through the garage side door that let out only feet from her front door (Exhibit D, pp 29, 31, 32). In fact, a parking lot is more similar to a sidewalk than is the driveway involved here. A parking lot, when used for its intended primary purpose of parking, necessitates pedestrian traffic to access vehicles. By contrast, when a driveway is used

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[2] In *Rousaki v Souliotis*, unpublished per curiam decision of the Michigan Court of Appeals, issued March 5, 2013 (Docket No. 308139) (Exhibit G), the Court held:

> We hold that our Supreme Court's decision in *Allison* is controlling and that the trial court correctly ruled that the reasoning in *Allison* precludes Rousaki's claim under MCL 554.139(1)(a). Here, rather than a parking lot, the area on which plaintiff fell was a driveway, which is generally intended for the ingress, egress and parking of vehicles.

Defendant cites this unpublished case because it is the only case Defendant has located that addresses the purpose for which a driveway is intended for purposes of analysis under the Landlord-Tenant Act, MCL 554.139(1)(a). It is relevant because it supports Defendant's contention that a driveway, to the extent that it is intended for the parking of vehicles, is indistinguishable from a parking lot.

for its primary purpose of driving (and the car parked in the garage), there is no pedestrian use of the driveway at all. This Court has already determined that a parking lot – even though it requires pedestrian use – is fit for its intended purpose so long as tenants are able to park their vehicles in the lot and have "reasonable access" to their vehicles. *Id.* at 429. That holding necessarily encompasses a driveway, especially one – like in this case -- that requires no pedestrian passage at all.

The instant case is controlled by this Court's decision in *Allison*. There, the Court held that a parking lot covered in snow and ice is not unfit for its intended purpose. *Id.* at 430. The driveway in this case was not covered in snow and ice, but merely had snowy and icy patches (See Exhibit E). There can be no question but that Plaintiff had "reasonable access" to her vehicle. *Allison, supra.* It is undisputed that Plaintiff's husband, William Hendrix, unloaded groceries on the date of the incident without slipping and falling. Where others have successfully traversed the area in question, even though the Plaintiff did not, the Court of Appeals has correctly held that there is "reasonable access." In *Counterman v Converse Management Company,* unpublished per curiam decision of the Michigan Court of Appeals, issued April 24, 2012 (Docket No. 303598) (Exhibit H),[3] for example, where the plaintiff fell on ice while walking across a parking lot to her vehicle, yet plaintiff and others on the same day traversed the parking lot without incident, the Court held as a matter of law that MCL 554.139(1)(a) was not breached. "Reasonable minds [could not] differ that [plaintiff] was able to enter and exit the parking lot, vehicles could be parked in the parking lot, and [plaintiff] had reasonable, albeit not ideal, access to her car." *Counterman,*

[3] Defendant cites this unpublished case because it addresses the question of "reasonable access." It is relevant because it holds that access was reasonable where Plaintiff and others could successfully traverse the parking lot despite Plaintiff's falling on the occasion that gave rise to the suit.

supra. In this case too, where Plaintiff's husband could remove groceries and traverse the driveway without incident (Exhibit F, pp 25-26, 40), it is clear that she had reasonable access to her vehicle. Under these circumstances, the decision in *Allison, supra,* is controlling and the trial court correctly granted summary disposition for Defendant.

C. No exigent circumstances exist to distinguish this case from *Allison*.

The Court in *Allison, supra,* further suggested that some type of exigent circumstances would have to be present in order to trigger a duty under MCL 554.139(1)(a) with respect to the accumulation of snow and ice:

> 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 as being fit for its intended purposes.

Allison, supra, at 430. (Emphasis added.) The instant case presents circumstances considerably less "exigent" than those in *Allison, supra,* because Plaintiff could have avoided walking on the visibly icy driveway entirely, simply by asking her husband to park in the garage, which contained a rear entry door letting out approximately six feet from the door to Plaintiff's residence (Exhibit D, pp 29, 31, 32). Thus Plaintiff and her husband could access the apartment from their car without walking on the driveway at all. Furthermore, even after the car was parked on the driveway, there was no exigency requiring Plaintiff to encounter the ice. Mr. Hendrix testified that he could easily see the approximately plate-sized frozen area where water had accumulated from the downspout (Exhibit F, p 27). In fact, he did successfully avoid that and any other icy patch when bringing in the groceries both before and after Plaintiff's fall (Exhibit F, pp 25-26, 40).

Furthermore, the photographs attached hereto as Exhibit E demonstrate that the icy sheen covered only a portion of the driveway and was also avoidable (Exhibit E). Thus, Plaintiff too could easily have avoided the icy patch. No exigent circumstance required her to encounter it.

Conclusion

As Judge O'Brien opined in her dissenting opinion, this case should have been controlled by this Court's decision in *Allison, supra.* In *Allison,* this Court held that a parking lot is intended for the parking of vehicles, and is considered suitable for that purpose so long as tenants have "reasonable access" to their vehicles. *Id.* at 429. A driveway is intended for the transit and possibly the parking of vehicles. Insofar as it is intended for the transit of vehicles, it does not necessitate pedestrian access at all. Insofar as it is intended for the parking of vehicles, *it is functionally identical to a parking lot.* As the Court in *Allison* held, a parking lot covered in snow and ice was not unfit for its intended purpose. *Id.* at 430. The Court of Appeals majority clearly erred when it found a different outcome for the driveway involved in this case. This case is indistinguishable from *Allison, supra,* where the Court held that a lessor's obligation would only be triggered "under much more exigent circumstances than those obtaining in this case." *Id.* at 430. Those exigent circumstances are not present in the instant case, where Plaintiff could easily have avoided parking in the driveway altogether, and where the icy patch was clearly visible and easily avoidable.

RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests that this Honorable Court grant leave to appeal, or alternatively that it peremptorily reverse the decision of the Michigan Court of Appeals insofar as it held that there was a genuine issue of material fact as to Plaintiff's claim under MCL 554.139(1)(a), and reinstate the decision of the trial court granting summary disposition for Defendant.

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Dated: January 13, 2017

INDEX OF EXHIBITS