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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

CELESTINE STACKER, Personal Representative of the Estate of MAE HENDRIX,

Plaintiff-Appellee,

v

LAUTREC, LTD.,

Defendant-Appellant.

Supreme Court No. 155120

Court of Appeals No. 328191

Lower Court No. 14-142087-NO

____/

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SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT LAUTREC LTD.'S APPLICATION FOR LEAVE TO APPEAL

Dated: July 6, 2018

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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."

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STATEMENT OF FACTS

Introduction

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 (Complaint; Appendix, pp 2a-6a).[1] Plaintiff alleged that Defendant Lautrec, Ltd. was the owner of the premises, while Plaintiff was a tenant (Complaint, ¶¶ 4, 5; Appendix, p 3a). 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 (Complaint, ¶¶ 9-12; Appendix, pp 4a-5a). The trial court granted summary disposition for Defendant, finding both that the condition complained of was open and obvious, and 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; Appendix, p 114a). The Court of Appeals affirmed the trial court's "open and obvious" ruling, but reversed its conclusion that there was no fact issue as to whether the area in question for fit for its intended use as required by MCL 554.139(1)(1) (Court of Appeals decision; Appendix, pp 162a-167a). Defendant sought leave to appeal to this Court, which directed supplemental briefing and oral argument on the leave application (S Ct Order, 5/30/18; Appendix, p 175a). The parties have been directed to address "whether genuine issues of material fact preclude summary disposition on the plaintiff's claim that the driveway at issue was not 'fit for the use intended by the parties.' MCL 554.139(1)(a)." (*Id.*)

---

[1] The Complaint incorrectly alleged that Plaintiff was a tenant at premises located at 5460 Bentley Road, in the City of West Bloomfield, Michigan (Complaint, ¶ 4; Appendix, p 3a). However, Plaintiff's deposition testimony establishes that at the time of the accident she resided at 6165 Village Park Drive, Apartment 103 in West Bloomfield, Michigan (Mae Hendrix dep, p 6; Appendix, p 17a).

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The Incident

On the morning of the accident, Plaintiff and her husband entered the garage where their vehicle was parked through a door into the garage that is located approximately six feet from the front door of their apartment (Mae Hendrix dep, pp 29, 31, 32; Appendix, pp 22a, 23a). At deposition, Plaintiff testified that her garage was the middle garage of three that are attached to each other (Mae Hendrix dep, p 31; Appendix, p 23a) (See Photograph; Appendix, p 8a).

Plaintiff and her husband drove to the bank and then went grocery shopping (Mae Hendrix dep, p 27; Appendix, p 22a). When they returned home, Mr. Hendrix parked the car in the driveway instead of pulling it into the garage (Mae Hendrix dep, p 35; Appendix, p 24a). Their vehicle was a brown Ford Edge (William Hendrix dep, p 14; Appendix, p 39a). Photos taken immediately after the accident, while the ambulance was still at the scene, depict the brown Ford Edge parked in the center driveway (Photograph; Appendix, p 8a).

After exiting the vehicle, Plaintiff opened the rear passenger door and removed some groceries from the car (Mae Hendrix dep, pp 37-38; Appendix, pp 24a-25a). She walked behind the car and up the driveway toward the house (Mae Hendrix dep, p 38; Appendix, p 25a). She then slipped and fell (*Id.*). Plaintiff marked the spot where she fell on a photograph (Mae Hendrix dep, p 40; Appendix, p 25a) (Photograph; Appendix, p 14a).

The photographs, taken shortly after the incident while an ambulance was still present, show snow patches on the driveway (Photographs; Appendix, pp 8a-14a). The weather on the day of the accident was cold (Mae Hendrix dep, p 32; Appendix, p 23a). Plaintiff testified that snow was on the ground (*Id.*). Viewing the photographs of the scene, she testified that there were patches of visible snow and ice (Mae Hendrix dep, pp 61-62; Appendix, pp 30a-31a). She also testified

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that the ground appeared damp and had a glossy appearance with a sheer sheen on the driveway (Mae Hendrix dep, pp 57, 59, 62; Appendix, pp 29a, 30a, 31a).

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 (Mae Hendrix dep, p 65; Appendix, p 31a). She testified further that she had lived at the apartment since 1996 and knew of the downspout since that time (*Id.*). She was aware of the purpose of the downspout and of the possibility of ice formation (Mae Hendrix dep, pp 65-66; Appendix, pp 31a-32a).

Plaintiff's husband also testified that on the date of the incident there was snow on the ground and the weather was cold (William Hendrix dep, p 19; Appendix, p 40a). He noticed snow and visible ice on the driveway when he was walking in after the grocery trip and prior to Plaintiff's fall (William Hendrix dep, pp 26, 38; Appendix, pp 42a, 45a). He testified that the ice had formed from water running out of the downspout and accumulating in an indentation in the pavement (William Hendrix dep, p 27; Appendix, p 42a). Mr. Hendrix testified that he could easily see the approximately plate-sized frozen area where water had accumulated from the downspout (William Hendrix dep, p 27; Appendix, p 42a). Mr. Hendrix carried grocery bags from the car to the door without incident prior to Plaintiff's fall (William Hendrix dep, pp 25-26; Appendix, pp 41a-42a). Also after the accident, Mr. Hendrix and some maintenance workers carried the remaining groceries into the apartment without incident (William Hendrix dep, p 40; Appendix, p 45a).

Procedural History

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; Appendix, p 70a). 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 (*Id.*). Defendant further argued that Plaintiff's premises liability claim was barred by the open and obvious doctrine (Defendant's Motion for Summary Disposition, p 16; Appendix, p 77a).

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; Appendix, p 90a). Plaintiff characterized the driveway as a "mixed use common area" (Plaintiff's Response to Defendant's Motion for Summary Disposition, pp 5, 8; Appendix, pp 89a, 92a). 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; Appendix, p 92a). Plaintiff further argued that the open and obvious doctrine was inapplicable, among other reasons because she slipped on "black ice" (Plaintiff's Response to Defendant's Motion for Summary Disposition, pp 9, 12; Appendix, pp 93a, 96a).

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; Appendix, p 101a).

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

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use" (Tr. 6/24/15, p 10; Appendix, p 114a). 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; Appendix, p 113a). 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 that stepping on the patch of ice was unavoidable." (Tr. 6/24/15, pp 9-10; Appendix, pp 113a-114a).

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 (Court of Appeals Decision, pp 2-4; Appendix, pp 163a-165a) (Opinion by Judge O'Brien, p 1; Appendix, p 167a). Rejecting Plaintiff's contention that the danger was "effectively unavoidable," the majority 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." (Court of Appeals decision, p 4; Appendix, p 165a.)

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 (Court of Appeals decision, p 4; Appendix, p 165a). The majority first noted that the parties agreed that the connected row of driveways was a common area (*Id.*). The majority

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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.

(*Id.*) 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" (*Id.*). 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" (*Id.*). 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" (*Id.*) (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.

(*Id.*)

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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 (Opinion by Judge O'Brien, p 1; Appendix, p 167a). 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.

(Opinion by Judge O'Brien, p 1; Appendix, p 167a.)

Defendant sought leave to appeal to this Honorable Court. On June 7, 2017, this Court placed the instant case in abeyance pending decision of *Martin v Milham Meadows I Ltd Partnership* (Docket No. 154360), which was currently pending before this Court (Order, June 7, 2017; Appendix, p 169a). On March 9, 2018, this Court denied leave in *Martin* (Order, March 9, 2018; Appendix, p 171a). On May 30, 2018, this Court directed the clerk to schedule oral argument on whether to grant Defendant's Application in the instant case or take other action (Order, May 30, 2018; Appendix, p 175a). The parties were directed to file supplemental briefs addressing "whether genuine issues of material fact preclude summary disposition on the plaintiff's claim that the driveway at issue was not 'fit for the use intended by the parties'" as contemplated by MCL 554.139(1)(a) (Order, May 30, 2018; Appendix, p 175a).

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LAW AND ARGUMENT

<u>Standard of Review</u>

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:

> 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.
>
> (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. 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. The *Allison* Court held that "in 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." *Id.* at 427. The Court further found that "a parking lot within a leased residential property fits within the meaning of 'common area' because it is accessed by two or more, or all, of the tenants and the lessor retains general control." *Id.* at 428.

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 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. The Court in *Allison* went on to explain that "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." *Id.* at 430. Upon the facts presented, the Supreme Court found that "[t]he Court of Appeals

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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. The driveway area where Plaintiff fell was a "common area."

The majority in this case correctly 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" (Court of Appeals Decision, p 4; Appendix, p 165a) (Defendant's Motion for Summary Disposition, p 9; Appendix, p 70a) (Plaintiff's Response to Defendant's Motion for Summary Disposition, p 8; Appendix, p 92a) (Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition, p 3; Appendix, p 101a). The driveway upon which Plaintiff fell was accessed by at least two tenants of the apartment complex, as it was used by Plaintiff – as in this case -- for pedestrian access to her apartment, and also presumably used by the resident whose garage it abutted for vehicular access to that garage, and possibly by that resident for pedestrian access to his or her apartment. Moreover, the evidence shows that Defendant retained control over the driveway area to the extent that it cleared these areas of snow and placed calcium chloride on them to melt ice if it was observed (Sutphin dep, pp 13, 14-15; Appendix, pp 55a, 56a). Thus, the panel properly treated the adjoined driveways as a common area: that is, an area shared by two or more tenants over which the lessor retains control. *Allison,* 481 Mich at 427. Because the driveway was a "common area", it was the Defendant's contractual duty to keep the driveway "fit for the use intended by the parties." MCL 554.139(1)(a). *Allison,* 481 Mich at 429.

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

In the instant case, there is no genuine issue of material fact as to whether the driveway in question was fit for the use intended by the parties. This Court's decision in *Allison* compels the conclusion that the driveway involved in this case was fit for its intended use.

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 – applies with even greater force to a driveway[2]. 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, with possibly the secondary purpose of parking, of vehicles.[3]

[2] In using a parking lot for its primary purpose of parking cars, one must necessarily walk to and from one's parked car. In using a driveway for its primary purpose of driving, one does not get in or out of one's car, therefore, one does not walk in driveway when the driveway is being used for its primary purpose. Therefore, a driveway is not more like a sidewalk than a parking lot. In fact, a parking lot is more like a sidewalk than is a driveway.

[3] In *Rousaki v Souliotis,* unpublished per curiam decision of the Michigan Court of Appeals, issued March 5, 2013 (Docket No. 308139) (Appendix, p 178a), 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.

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 (Plaintiff's Court of Appeals Brief, pp 6, 9; Appendix, pp 130a, 133a). But this argument fails to distinguish the instant case from *Allison,* because 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 (Court of Appeals Decision, p 4; Appendix, p 165a), 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. As noted above, the vehicle could have been parked in the garage, allowing Plaintiff to exit the garage through the door that let out only feet from her front door (Mae Hendrix dep, pp 29, 31, 32; Appendix, pp 22a, 23a).

Common understanding would counsel, furthermore, that 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 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," albeit not ideal access, to their vehicles. *Allison,* 481 Mich at 429, 430. That holding necessarily encompasses a driveway, especially one – like in this case -- that requires no pedestrian passage at all.

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The instant case is controlled by this Court's decision in *Allison*. There, the Court held as a matter of law that a parking lot covered in snow and ice was 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 (Photographs; Appendix, pp 8a-14a). There can be no question but that Plaintiff had "reasonable access" to her vehicle, and to her apartment from the 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) (Appendix, pp 181a-182a),[4] 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, supra.* In this case too, where Plaintiff's husband could remove groceries and traverse the driveway without incident (William Hendrix dep, pp 25-26, 40; Appendix, pp 41a-42a, 45a), it is clear that Plaintiff 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.

[4] 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.

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D. 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 (Mae Hendrix dep, pp 29, 31, 32; Appendix, pp 22a, 23a). 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, which was easily avoidable. Mr. Hendrix testified that he could easily see the approximately plate-sized frozen area where water had accumulated from the downspout (William Hendrix dep, p 27; Appendix, p 42a). In fact, he did successfully avoid that and any other icy patch when bringing in the groceries both before and after Plaintiff's fall (William Hendrix dep, pp 25-26, 40; Appendix, pp 41a-42a, 45a). Furthermore, the photographs taken a short time after the incident demonstrate that the icy sheen covered only a portion of the driveway and was also avoidable (Appendix, pp 8a-14a). Indeed, as the Court of Appeals majority expressly found in the context of its "open and

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obvious" analysis: "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." (Court of Appeals decision, p 4; Appendix, p 165a.) Thus, Plaintiff 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.

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RELIEF REQUESTED

WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court grant leave to appeal, or in the alternative, issue a decision reversing the decision of the 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 reinstating the decision of the trial court granting summary disposition for Defendant, or in the alternative, peremptorily reverse the decision of the 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.

SECREST WARDLE

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Dated: July 6, 2018

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