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., a Michigan Corporation,

Defendant/Appellant

Supreme Court No.: 155120

Court of Appeals No.: 328191

Lower Court No.: 14-142087-NO

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PLAINTIFF/APPELLEE'S RESPONSE IN OPPOSITION TO DEFENDANT/APPELLANT LAUTREC LTD.'S APPLICATION FOR LEAVE TO APPEAL

Date: August 23, 2018

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Plaintiff/Appellee says: No

Defendant/Appellant says: Yes

II. DID THE COURT OF APPEALS CORRECTLY RULE THAT A QUESTION OF FACT REMAINED AS TO WHETHER THE SUBJECT DRIVEWAY WAS FIT FOR ITS INTENDED USE AS A POINT OF ACCESS BETWEEN A PUBLIC ROAD AND A DWELLING AND/OR GARAGE?

Plaintiff/Appellee says: Yes

Defendant/Appellant says: No

COUNTER STATEMENT OF FACTS

Facts of the Incident.

On the morning of March 1, 2013, then 62-year-old retiree Mae Hendrix[1] and her husband, William, left their home located at 5460 Bentley Road in West Bloomfield to run errands. (See Complaint; Appellant's Appendix, pg. 2a).[2] The pair exited their rental townhome via their vehicle, which was parked in their garage, and upon their return home, Mr. Hendrix parked it in the driveway. (See Mae Hendrix Dep., pg. 29, 35; Appendix, pg. 22a, 24a). Mrs. Hendrix exited the vehicle, retrieved groceries from the backseat, and walked behind the vehicle toward her front door, which was located to the left of the driveway. (Mae Hendrix Dep., pg. 37-38; Appendix, pg. 24a-25a). Mrs. Hendrix then walked along the edge of the driveway toward her front door. (See Mae Hendrix Dep., pg. 38; Appellant's Appendix, pg. 25a; Photos; Appendix, pg. 7a). As she approached the building, her feet slipped out from beneath her, and she fell, slamming the right side of her body into the concrete walkway. (See Mae Hendrix Dep., pg. 38; Appendix, pg. 25a). Upon impact, Mrs. Hendrix felt excruciating pain in her right leg and shoulder, and she suffered a gash to her forehead. (See Mae Hendrix Dep., pg. 39-42; Appendix, pg. 25a-26a). She screamed out in pain and quickly discovered that she could not stand up. (See Mae Hendrix Dep., pg. 39-42; Appendix, pg. 25a-26a). As Mrs. Hendrix lay on the ground, waiting for her husband to assist her, she noticed blood on the ground but no ice or salt. (See Mae Hendrix Dep., pg. 39-42; Appendix, pg. 25a-26a).

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1 On May 11, 2017, Mae Hendrix died; therefore, Plaintiff/Appellee to this case is now Celestine Stacker, Personal Representative of the Estate of Mae Hendrix.

2 In the interest of judicial economy, Plaintiff/Appellee stipulates to the Appellant's Appendix and will cite all supporting evidence to its location therein.

Mrs. Hendrix testified that on the morning of her fall, the weather was cold, and she believed it had snowed "just a little" the night before. (See Mae Hendrix Dep., pg. 32-33; Appendix pg. 23a). She did not observe any ice or other precipitation while running her errands. (See Mae Hendrix Dep., pg. 48; Appendix, pg. 24a). In addition, she testified that she did not observe any salt on her driveway at the time of her fall and that the ground looked "damp." (See Mae Hendrix Dep. pg. 57-59; Appendix, pg. 29a-30a). Mrs. Hendrix's husband confirmed her recollection of the weather conditions, and he further testified that although he observed an accumulation of snow on the ground, the driveway was clear along the path they traversed. (See William Hendrix Dep, pg. 19-21; Appendix, pg. 40a). Mr. Hendrix testified that it was his belief that his wife slipped and fell on an unnatural accumulation of water and/or ice that was created by the improper draining of a downspout from the roof onto the driveway. (See William Hendrix Dep., pg. 27; Appendix, pg. 42a). As he explained, "There's a downspout, and at the end of the downspout where the water run[s] down, there was an indentation in the blacktop, quarter inch, inch whatever you want to say it is, and it had filled up." (See William Hendrix Dep., pg. 27; Appendix, pg. 42a). He further testified that prior to his wife's fall, he observed no salt in the area of the indentation. (See William Hendrix Dep., pg. 27; Appendix, pg. 43a). Following her fall, however, he observed Defendant/Appellant's employees putting down salt on the area in question. (See William Hendrix Dep., pg. 27; Appendix, pg. 44a). During his deposition testimony, Defendant/Appellant's employee, David Sutphin, confirmed Mr. Hendrix's recollection of the driveway at the time of the accident, wherein he admitted to cracks and unevenness in the pavement that looked wet and/or icy in photographs (See Sutphin Dep., pg. 26-27; Appendix pg. 59a). When asked why the driveway would be so wet, Mr. Sutphin testified,

"My assumption would be from the gutter." (See Sutphin Dep., pg 26-27, 30, 32, 38; Appendix, pg. 59a, 60a, 62a).

The Court of Appeals provided the following description of the driveway at issue, and it is upon this description that Plaintiff/Appellee now relies:

> From pictures presented into evidence, the apartments appear to be two-story residences connected side-by-side. The row of apartments does not directly abut the roadway. The photographs depict a series of connected garages and side-by-side driveways situated between the apartments and the street. Each tenant has an individual garage and driveway. Each individual garage opens onto the connected strip of driveways. The garages also have rear-entry doors. A walkway behind the garages provides access from the residential units to the rear-entry doors. There is no sidewalk at the bottom of the driveways.

Hendrix v Lautrec Ltd, 2016 Mich App LEXIS 1992 at 1-2 (Docket No. 328191). It is undisputed that the driveway described herein, upon which Mrs. Hendrix fell, is a common area of the subject apartment complex. *Id*. at 2.

Facts of the Lawsuit.

On July 29, 2014, Plaintiff/Appellee initiated this lawsuit in the Oakland County Circuit Court. Discovery progressed in typical fashion, and at its close, Defendant/Appellant field its motion for summary disposition. On June 25, 2015, the trial court granted the motion, and on July 6, 2015, Plaintiff/Appellee filed her Claim of Appeal with the Court of Appeals. On October 27, 2016, in a 2-1 decision, the Court of Appeals issued an unpublished opinion signed by the Honorable Karen Fort Hood and the Honorable Elizabeth L. Gleicher. The Honorable Colleen A. O'Brien wrote separately to concur in part and dissent in part.

Regarding the issue before this Honorable Court, i.e., whether Plaintiff/Appellee demonstrated a triable question of fact that Defendant/Appellant violated MCL 554.139(1)(a) when it failed to keep the driveway "fit for the use intended by the parties[,]" the majority held,

"Hendrix established a genuine issue of material fact regarding whether Lautrec breached its duty under MCL 554.139(1)(a) to maintain the driveway in a manner befitting its intended use." *Hendrix*, 2016 Mich App LEXIS 1992 at *9. In support of this holding, the majority noted, "We could locate no precedent describing 'the use intended by the parties' for a common driveway." *Id*. 8. Thereafter, it engaged in an analysis wherein it examined the driveway relative to a parking lot, as discussed by this Honorable Court in *Allison v AEW Capital Mgt LLP*, 481 Mich 419; 751 NW2d 8 (2008), and relative to a sidewalk, as discussed by the Court of Appeals in *Benton v Dart Props Inc*, 270 Mich App 437; 715 NW2d (2006). *Id*. at 8-9. Ultimately, the majority concluded:

> But a driveway is not a parking lot. Unlike a parking lot, the connected driveways in this case are not used primarily for parking in practice; they are also intended for pedestrian access to residential units. In these senses, the driveways are more akin to sidewalks. … It has long been held that '[s]idewalks are intended for the use of pedestrians, and they are entitled to walk upon them," even if the sidewalk bears defects.

Id. at 9 (quoting *Sargeant v Detroit*, 156 Mich 291, 294; 120 NW 792 (1909)). Turning, then, to the specific facts of the case before it, the majority stated:

> 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.

Id. Accordingly, the majority ruled, "Because the record supports that pedestrian travel constituted an 'intended use' of the connected driveways, we reverse the dismissal of Hendrix's statutory claims and remand for continued proceedings." *Id*. at 10. In her dissenting opinion, Judge O'Brien concurred with the majority's decision to affirm Plaintiff/Appellee's common law

claim but dissented with its ruling regarding her statutory claim, reasoning that *Allison* addressed pedestrian access in a manner applicable to the facts of the instant case. *Id*.

On November 16, 2016, Defendant/Appellant filed a Motion for Reconsideration, which the Court of Appeals denied on December 7, 2016. Thereafter, January 13, 2017, it filed the instant Application for Leave to Appeal from the Court of Appeals, which this Court held in abeyance until such time that it ruled upon the Application filed in *Martin v Milham Meadows I Ltd Partnership*, 2016 Mich App LEXIS 1616 (Docket No. 154360). On March 9, 2018, this Honorable Court denied the Application filed in *Martin*, and on May 30, 2018, this Honorable Court again considered the subject Application. In so doing, it ordered supplemental briefing and oral argument pursuant to MCR 7.305(H)(1). Plaintiff/Appellee did not file a Response to Defendant/Appellant's initial Application, and as such, this "Supplemental" Response is the only pleading Plaintiff/Appellee has filed with this Honorable Court. For the reasons laid out more fully herein, Plaintiff/Appellee now asks this Honorable Court to DENY the instant Application, so that this case may proceed before a trier of fact, as ordered by the Court of Appeals.

LAW AND ARGUMENT

Standard of Review.

Regarding the standard of review governing the substantive issues of this case, i.e., dispositive motions and questions of law, Plaintiff/Appellee agrees with and reasserts the standard articulated by the Court of Appeals in its majority opinion:

> [The Court of Appeals] review[s] de novo a circuit court's resolution of a summary disposition motion. *Allison v AEW Capital Mgt*, LLP, 481 Mich 419, 424; 751 NW2d 8 (2008). "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.'" *Id*. 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*.
>
> [The Court of Appeals] also review[s] de novo questions of law, including the application and interpretation of statutes. *Id*. at 424. "The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Id*. at 427 (quotation marks and citation omitted). When statutory language is clear, courts interpret the language according to its plain and ordinary meaning. *Id*.

Hendrix, 2016 Mich App LEXIS 1992 at 3-4.

Regarding the procedural issue of whether it should accept Defendant/Appellant's Application, Plaintiff/Appellee directs this Honorable Court's attention to MCR 7.305(B)(1)-(6). Therein, the Michigan Court Rules provide the grounds by which an Application such as this can be granted or denied, wherein it states, in relevant part, that the Application must show:

******

> (3) 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; … .

The statute is compulsory, wherein it demands that an application "must show[;]" therefore, absent a showing of a basis delineated by MCR 7.305(B), an application cannot be granted.

I. THE CASE-SPECIFIC, FACT-INTENSIVE INQUIRY AT ISSUE HEREIN DOES NOT INVOLVE AN ISSUE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPURDENCE, NOR IS THE COURT OF APPEALS' DECISION CLEARLY ERRONEOUS.

Plaintiff/Appellee asks this Court to DENY the instant Application for Leave to Appeal, given Defendant/Appellant has failed to demonstrate that the Court of Appeals' ruling was clearly erroneous and will cause material injustice. See MCR 7.305(B)(5)(a). Issues regarding adherence to MCL 554.139(1)(a) involve statutory interpretation and are otherwise inherently fact-intensive. Where, as here, the Court of Appeals engaged in proper statutory interpretation, applying the plain and ordinary meaning of the terms at issue, examined precedent, and used that framework to analyze the evidence presented, its holding cannot be considered clearly erroneous. This is so, because a decision will only be considered clear error "… when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). *Id*. As Plaintiff/Appellee will detail thoroughly below, as the basis of its Application, Defendant/Appellant asks this Honorable Court apply *Allison v AEW Capital Mgt, LLP* in a lopsided way, wherein it would give outsized weight to the definition of the term "parking lot" and eviscerate the *Allison* admonishment that whether a premises is fit for its intended purpose is ultimately a question of fact. This position is not supported by the law or the facts of this case, and the fact the Court of Appeals majority recognized as much and rejected Defendant/Appellant's position does not constitute a clear error causing material injustice, as required by MCR 7.305(B)(5).

Regarding MCR 7.305(B)(3), Plaintiff/Appellee submits that this lawsuit involves a simple dispute between a landlord and its tenant, and the outcome will ultimately be driven by the specific facts of the case. As such, it is unreasonable for Defendant/Appellant to suggest that

subject "issue involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3).

II. THE COURT OF APPEALS CORRECTLY RULED THAT A QUESTION OF FACT REMAINS AS TO WHETHER THE SUBJECT DRIVEWAY WAS NOT FIT FOR ITS INTENDED USE AS A POINT OF ACCESS BETWEEN A PUBLIC ROAD AND A DWELLING AND/OR GARAGE.

The intended use of the term "driveway," and what constitutes fitness for that use, lie at the heart of this lawsuit. As the Court of Appeals correctly noted in its majority opinion, no precedent yet exists as to the intended use of a driveway. Given that Plaintiff/Appellee seeks application of the so-called landlord tenant statute to her claims, and no binding precedent relating this specific issue exists, statutory interpretation is thus required regarding both the definition of a driveway and its intended use. *See Allison*, 481 Mich at 427, 429; *Hendrix*, 2016 Mich App LEXIS 1992, at * 3-4, 8. By way of background, a landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). MCL 554.139 imposes an explicit duty of care upon landholders such as Defendant/Appellant with regard to tenants, and the terms of the statute must be broadly construed, so as to ensure that residents and tenants are afforded protection in their homes. MCL 554.139(3). Specifically, MCL 554.139 provides in relevant 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.***
> >
> > (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.
>
> ******
>
> (3) ***The provisions of this section shall be liberally construed***, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

(Emphasis added). The significance of this non-delegable duty is made clear by the fact that the open and obvious doctrine cannot abrogate a landlord's statutory duty. *Benton v Dart Properties Inc*, 270 Mich App 437, 441; 715 NW2d 335 (2006) ("[I]f Defendant/Appellee breached its duties under MCL 554.139, Defendant/Appellee would be liable to plaintiff even if the ice on the sidewalk was open and obvious."). Its significance is likewise underscored by the fact that the Legislature expressly provided that "[t]he provisions of this section shall be liberally construed ... ." MCL 554.139(1)(a).

A. With *Allison v AEW Capital Mgt, LLP*, this Honorable Court provides analysis of the term "parking lot" and the MCL 554.139(1)(a) duties relating thereto.

This Court addressed the duty to keep all common areas fit for their intended uses within the context of a parking lot in *Allison*, a case upon which Defendant/Appellant relies upon almost exclusively to avoid liability for Mrs. Hendrix's injuries. In *Allison*, this Court first addressed the issue of whether a subject premises is considered a "common area" for purposes of MCL 554.139; however, because all parties agree that the subject driveway was, indeed, a common area, analysis herein can be contained to the second area of focus, i.e., a lessor's duty under the statute. *Id*. at 429. Regarding the intended use of a parking lot, this Court stated, "We agree [with the Court of Appeals] that the intended use of a parking lot includes the parking of vehicles. A parking lot is constructed for the purpose of storing vehicles on the lot." *Id*. Regarding fitness,

this Court stated, "'Fit' is defined as 'adapted or suited; appropriate[.]" *Id.* (quoting *Random House Webster's College Dictionary* (1997)). This Court then went on to hold:

> Therefore, a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. ***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 show 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. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used.

Id. (Emphasis added). Thereafter, this Court engaged in a lengthy analysis of the specific facts before it ultimately determined whether the *Allison* defendant had fulfilled its MCL 554.139(1)(a) obligations to the plaintiff. In so doing, this Court noted, "Plaintiff's allegation of unfitness was supported by only two facts: that the lot was covered in one to two inches of snow and that the plaintiff fell." *Id*. at 430. Thus, this Court held:

> ***Under the facts presented in this record,*** we believe 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. Accordingly, plaintiff has not established that the tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law.

Id. (Emphasis added). In support of this holding, this Court went on to explain:

> We recognize that tenants must walk across a parking lot to access their vehicles. However, ***plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle.*** The Court of Appeals erred in concluding that, ***under the facts presented***, the parking lot in this case was unfit, simply because it was covered in snow and ice.

Id. (Emphasis added). Accordingly, the salient points of this portion of *Allison* are these: First, the intended use of a parking lot includes the storage of vehicles and reasonable access to those vehicles, and second, whether a parking lot is fit for its intended use is a fact-intensive inquiry.

B. The framework provided by *Allison* demonstrates that a driveway is not the functional or legal equivalent of a parking lot.

Throughout its pleadings, and in particular, this Application, Defendant/Appellant has suggested that a driveway is the functional equivalent of, and/or functionally identical to, a parking lot. (See e.g., *Df Lautrec Ltd's Application for Leave to Appeal*, pg. 8, 9; *Df Lautrec Ltd's Supplemental Brief in Support of [Its] Application for Leave to Appeal*, pg. 11-15). In so doing, Defendant/Appellant ignores the fact that while a parking lot is defined as "an area used for the parking of motor vehicles[,]" a driveway is defined quite differently as "a private road giving access from a public way to a building on abutting grounds." (See, "parking lot" and "driveway" Merriam-Webster Online Dictionary. 2018. http://www.merriam-webster.com (20 Aug. 2018)). The definition "driveway," contains absolutely no reference to a motor vehicle, and the term access is not qualified or otherwise limited to vehicular travel. Thus, it follows that to avoid liability for Mrs. Hendrix's injuries, Defendant/Appellant was statutorily required to maintain the area fit for both vehicular and pedestrian traffic accessing the residence and/or garage from the street. Because Defendant/Appellant failed to do so, Plaintiff/Appellee submits that Defendant/Appellant is liable for her injuries. The *Hendrix* majority agreed that a question of fact remains as to this issue, wherein it held, "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 further proceedings." *Hendrix*, 2016 Mich App LEXIS 1992 at *10.

As noted herein, the *Hendrix* majority began its analysis by noting, "We could find no precedent describing the use intended by the parties' for a common driveway." *Id*. at 8. Thereafter, it recognized the limitations of this Court's *Allison* parking lot analysis, wherein it stressed, "But a driveway is not a parking lot." *Id*. 8. It went on to explain, "Unlike a parking lot, ***the connected driveways in this case are not used primarily for parking in practice; they are also intended for pedestrian access to the residential units.*** In these senses, the driveways are more akin to sidewalks." *Id.* at 8-9. (Emphasis added). This is so, because, as the photos clearly depict, but for traversing the driveway on foot, there is no way for a tenant, such as Mrs. Hendrix, to access the front door of her residence. (See Photos; Appendix, pg. 7a). The key to this analysis is thus access, and access is likewise the key differentiator between a driveway and a parking lot.

Although it addresses an external stairway, rather than a driveway, Plaintiff/Appellee submits that the published decision of *Hadden v McDermitt Apts LLC* is significantly more applicable to the question before this Honorable Court than the unpublished decision of *Rousaki v Souliotis*, upon which Defendant/Appellant relies to support its claim of similarity between parking lots and driveways. 287 Mich App 124; 782 NW2d 800 (2010); 2013 Mich App LEXIS 403 (Docket No. 308139)). (See Appendix, pg. 176a). This is so, because *Hadden* turns on access to a residential unit, rather than to a vehicle parked on the premises. In *Hadden*, the Court of Appeals addressed a situation wherein a plaintiff slipped and fall on black ice located on an external stairway connecting her apartment to the ground level. 287 Mich App at 126. Importantly, the recitation of facts contained therein is silent as to whether the subject stairway served as the only means of accessing the ground level. *Id*. The *Hadden* majority began its analysis by admonishing, "Our Supreme Court in *Allison* made it clear that an accumulation of snow and ice

could implicate a landlord's duty to keep the premises and all common areas fit for the use intended." *Id*. at 128. Thereafter, it stated, "The primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or a structure." *Id*. at 130. Thus, like a driveway, and unlike a parking lot, the primary purpose of a stairway turns upon access. The *Hadden* majority went on to explain, "We must ascertain whether there could be reasonable differences of opinion regarding whether the stairway was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall." *Id*. Following an evaluation of the facts before it, including evidence that the *Hadden* premises, like the instant premises, may have included an unnatural accumulation of ice resulting from gutter run-off, the *Hadden* majority ultimately held that a question of fact remained as to whether the defendant had fulfilled its MCL 554.139(1)(a) duty. *Id*. at 132. In so doing, the *Hadden* majority made the following critical, distinctions from *Allison*, which Plaintiff/Appellee submits apply to the instant case:

> … as the Court stated in *Allison*, the primary use of a parking lot is to park cars. *Id*. at 429. Although the Court recognized that tenants must have reasonable access to their vehicles in a parking lot, i.e., they must be able to walk to their vehicles, *id*., ***tenants do not use a parking lot for its intended use by merely walking in the lot.*** Walking in a parking lot is secondary to the parking lot's primary use.

Hadden, 287 Mich at 132. (Emphasis added). Although the *Hadden* court went on to suggest that the primary purpose of a stairway is access by way of walking specifically, the analysis remains the same for the instant case: The primary purpose of a driveway is to provide access from the street to a building abutting the grounds. Whether that access is obtained by foot or vehicle, the intended use of a driveway does not change. Just as the stairway in *Hadden* must be fit for its intended use of providing access between the plaintiff's floor and the ground level, so too must

the driveway in the instant case be fit for its intended use of providing residents, such as Mrs. Hendrix, access to residential units and garages from the road.

C. Where, as here, genuine issues of material fact remain, *Allison* requires a proper finding of fact.

As noted throughout this brief, *Allison* ultimately requires a fact-intensive inquiry to determine both the intended use of a subject premises and whether the subject premises was fit for that intended use. To wit, the Honorable Judge Douglas Shapiro noted in his dissent to the majority opinion rendered in *Rousaki v Souliotis*:

> The *Allison* court was careful to note that whether or not the lot was fit pursuant to [the articulated] standard constituted a *factual determination*. It considered the factual record and found that plaintiff had failed to submit sufficient evidence to create a question on the issue of fact. …
>
> … The *Allison* court could have concluded as a matter of law that snow and ice on residential parking lots or walkways cannot interfere with the areas' intended use. However, it did not do so. Instead, it considered whether the record before it created a question of fact.

Rousaki, 2013 Mich App LEXIS 403 at *12, 13. So too did the Court of Appeals consider the instant record, before the majority correctly concluded that a genuine issue of material fact remained. In particular, the majority examined the photos submitted by Mrs. Hendrix and stated:

> The photos demonstrate that a substantial portion of the 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.

Hendrix, 2016 Mich App LEXIS 1992 at *9. In addition to these facts, Mrs. Hendrix submits Defendant/Appellant's own employee, David Sutphin, admitted that the subject driveway was cracked and that gutter was known to make the driveway excessively wet. (See Sutphin Dep., pg.

26-27, 38; Appendix, pg. 59a, 60a, 62a). Moreover, although the driveway had been cleared, such that a car could drive and/or park on it, it had not been salted, despite the known problem, acknowledged by Defendant/Appellee's own employee, with water pooling at freezing on the driveway in the depression beneath the downspout. (See Sutphin Dep., pg. 26-27, 38; Appendix, pg. 59a). With the unnatural accumulation of ice in place, the driveway was certainly not fit for its intended purpose of providing access from the road to the residential units and/or garages; therefore, Defendant/Appellant must be held liable pursuant to MCL 544.139. These circumstances clearly rise to the level of "exigent circumstances," as described by this Honorable Court in *Allison*, inasmuch as the evidence far surpasses the "two facts" proffered by the *Allison* plaintiff, i.e., "that the lot was covered with one to two inches of snow and that plaintiff fell." *Allison*, 481 Mich at 430.

Both Defendant/Appellant and the trial court have suggested that the driveway was fix for its intended use, because a vehicle could be parked there. However, in so doing, neither the Defendant/Appellant nor the trial court acknowledges the fact that the intended use of a driveway is not limited to access via a vehicle. Rather, in addition to being fit to provide vehicular access, the subject driveway also needed to be fit to provide access to the residential units and/or garage by foot. Here, it is undisputed that the driveway was uneven and prone to small, yet treacherous, unnatural accumulations of ice, and it was on such an unnatural accumulation that Mrs. Hendrix slipped and fell. Given the known dangers posed to those traversing the driveway on foot, at a minimum, a question of fact remains as to whether Defendant/Appellant had fulfilled its MCL 544.139 duties to Mrs. Hendrix. The *Hendrix* majority recognized as much in its opinion, and Plaintiff/Appellee now asks this Honorable Court to do the same and DENY Defendant/Appellant's Application for Leave to Appeal.

RELIEF REQUESTED

For the foregoing reasons, the Plaintiff/Appellee, Celestine Stacker, Personal Representative of the Estate of Mae Hendrix, respectfully requests that this Honorable Court DENY Defendant/Appellant Lautrec Ltd.'s Application for Leave to Appeal, and allow Plaintiff/Appellee to bring her claims before a trier of fact for a fair adjudication on the merits.

Respectfully submitted,

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