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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DEFENDANT'S REPLY TO PLAINTIFF'S SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

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?

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 STREET OR PARKING LOT.

In an attempt to persuade this Court that a driveway is not intended primarily for driving as its name so obviously implies, Plaintiff has cited a dictionary definition of driveway that contains no reference to motor vehicles, defining a driveway as "a private road giving access from a public way to a building on abutting grounds," (citing Merriam-Webster Online Dictionary 2018, http://www.merriamwebster.com). This definition fails to prove Plaintiff's point, because a road is itself meant primarily for vehicular travel. For example, road is defined by Webster's New World College Dictionary (4th ed) as "a way made for traveling between places, esp. distant places, by automobile, horseback, etc.; highway." The same dictionary defines "driveway" as "a private way or road **for cars**, leading from a street or road to a garage, house, etc." Webster's New World College Dictionary (4th ed) (emphasis added). These definitions, including that employed by Plaintiff, clearly reflect that a driveway is primarily intended for the transit, and possibly the parking of vehicles.

When discussing the "primary purpose" of a "driveway," "parking lot" or "sidewalk," the terms themselves point directly to the "primary purpose" of each. The primary purpose of a "**parking** lot" is **parking**. *Allison*, 481 Mich at 429 (storage of vehicles). The intended purpose of a "side**walk**" is for **walking**. *Benton v Dart Properties, Inc*, 270 Mich App 437, 444; 715 NW2d 335, 340 (2006). Equally, the primary purpose of a "**drive**way" is for **driving**. Frankly, a "parking lot" is more like a "sidewalk" than a "driveway" is like a "sidewalk" since exercising the primary purpose of parking in a parking lot necessitates walking in the parking lot to and from one's

vehicle. Conversely, exercising the primary purpose of driving in a driveway does not necessitate walking in the driveway.

Defendant recognizes of course, that once one parks a car on a driveway (which one may do, just like one may park a car on a road), one must then traverse the driveway on foot in order to access the related residence. **In this respect, a driveway is indistinguishable from a road or parking lot.** And, as this Court held in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008):

> 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. "Fit" is defined as "adapted or suited; appropriate [.]" *Random House Webster's College Dictionary* (1997). 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 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**. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used.

Id. at 429 (emphasis added). The question becomes what is meant by "reasonable access" to a vehicle parked in a driveway or to a residence from the vehicle. This Court in *Allison* considered what constituted reasonable access to a vehicle parked in a parking lot, and concluded that **a parking lot was not rendered unfit merely because it was covered in snow and ice**:

> We recognize that tenants must walk across a parking lot in order 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. at 430 (emphasis added). It is important to note that under these facts, this Court in *Allison* concluded **as a matter of law** that the parking lot was fit for its intended use. *Allison*, 481 Mich at 422, 439 (reinstating summary disposition for Defendant). Thus, while the question of fitness for a given purpose may be factual in nature, it is clear that the facts presented in *Allison* presented no genuine issue of material fact concerning the fitness of a parking lot. A parking lot "covered in snow and ice" was not unfit for its purpose.

Where the parking lot in *Allison* was "covered in snow and ice," the driveway in the instant case merely had patches of ice and snow (Appendix, pp 7a-14a). The evidence in this case also showed that the driveway could be easily traversed without slipping and falling. 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). Where the driveway could be easily traversed without slipping and falling, as a matter of law it provided reasonable access to the vehicle, and to Plaintiff's residence from the vehicle. *Allison* should be held to control the instant case.

This Court in *Allison* noted, finally, that while there might under some circumstances be a duty on a landlord's part with regard to an accumulation of ice and snow, it would only be triggered under circumstances "much more exigent" than those present in that case:

> 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.

Id. at 430 (emphasis added). In attempting to characterize the circumstances of the instant case as "exigent," Plaintiff emphasizes the driveway was cracked and that the gutter was known to release water onto the driveway, and that according to Plaintiff the driveway was not salted at the time of her fall (Appellant's Supplemental Brief, pp 14-15). These circumstances do not qualify as "exigent," which is defined in Webster's New World Dictionary (4th ed.) as "calling for immediate action or attention; urgent." This is especially so where the driveway merely had patches of snow and ice, unlike the *Allison* parking lot "covered in snow and ice" (See Photographs; Appendix 7a-14a). As for the alleged causation by a dripping downspout, the mechanism by which the water came to be on the driveway is irrelevant to the issue of fitness for a given purpose.

Finally, Plaintiff relies on the case of *Hadden v McDermitt Apartments, LLC,* 287 Mich App 124; 782 NW2d 800 (2010), arguing that *Hadden* is more applicable to this case than *Rousaki v Souliotis,* unpublished per curiam decision of the Michigan Court of Appeals, issued March 5, 2013 (Docket No. 308139) (Appendix, p 178a), even though *Rousaki* actually involves a driveway, whereas *Hadden* involves an outdoor stairway. *Hadden,* 287 Mich App at 126. While *Hadden* may be easily distinguished from *Allison* on this basis, Defendant urges that instead its outcome should have been controlled by *Allison*. Judge Meter, dissenting in *Hadden,* reasoned that where the Plaintiff's ability to use the stairway was not *precluded*, it was fit for its intended use:

> [L]ike the parking lot in *Allison*, the stairway here was suitable for its intended use. The *Allison* Court stated that "[a] parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id.* at 429, 751 N.W.2d 8. . . . . The Court ultimately concluded:
>
> > We recognize that tenants must walk across a parking lot in order 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.* at 430, 751 N.W.2d 8.]
>
> Similarly, plaintiff in this case did not show that the condition of the stairway precluded her ability to use the stairway to access different levels of the building. Unlike the plaintiff in *Allison*, who fell on his first encounter with the parking lot, plaintiff in this case had already successfully negotiated the steps, not just one other time but *three* times, having encountered the same icy condition the previous day. The stairway was not rendered unfit for its purpose simply because of the presence of some amount of ice that required a careful navigation of the steps.

Hadden, 287 Mich App at 134–35 (Meter, J., dissenting) (emphasis added). In accord with Judge Meter's dissent is a recent unpublished decision of the Michigan Court of Appeals, *Martinez v TMF II Waterchase, LLC,* unpublished per curiam decision of the Michigan Court of Appeals, issued December 15, 2016 (Docket No. 329931),[1] which correctly read *Allison* to mean that a plaintiff, in order to show unfitness of a sidewalk, "must present evidence indicating that he or she was unable to use the sidewalk":

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

[1] *Martinez, supra,* is currently in abeyance before this Court pending decision of the instant case. *Martinez v TMF II Waterchase, LLC,* 911 NW2d 729 (May 30, 2018). The Court of Appeals decision in *Martinez* is cited because it illustrates the correct application of *Allison* to other areas of pedestrian travel.

Id. (emphasis added).

In the instant case, Plaintiff has utterly failed to establish that she was unable to use the driveway to walk to her residence. As already noted, both Mr. Hendrix and maintenance personnel traversed the driveway without incident immediately before and after Plaintiff's fall. (William Hendrix dep, pp 25-26, 40; Appendix, pp 41a-42a, 45a). Clearly, Plaintiff's use of the driveway was not *precluded* by the patches of ice and snow on the driveway.

Conclusion

In summary, even under the narrowest possible reading of *Allison,* it must be held to control this case, because a driveway is functionally indistinguishable from a road or parking lot, and the circumstances of this case – patches of ice and snow on a driveway – are no worse for pedestrian access than those of *Allison* – a parking lot "covered in snow and ice." *Id.* at 430. But Defendant submits that *Allison* should not be read narrowly. Its holding should apply to sidewalks and stairways as well, since these are no different from a road or parking lot in that the latter also of necessity has as an intended use, walking across it to access one's car or to access one's residence from the car. Only when access is precluded, therefore, should the area be deemed unfit for the use intended. *Allison,* 481 Mich at 430; *Martinez, supra.* Clearly Plaintiff's access to her home was not precluded in the instant case, where others traversed the driveway without difficulty. Therefore, the trial court's Order granting summary disposition for Defendant should be reinstated.

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.

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Dated: September 6, 2018

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