STATE OF MICHIGAN

COURT OF APPEALS

JAMES GARLAND, Plaintiff-Appellee,	UNPUBLISHED July 22, 2014
v	No. 313120 Oakland Circuit Court
HARTMAN & TYNER, INC., KNOB IN THE WOODS, INC., d/b/a KNOB IN THE WOODS APARTMENTS, Defendants-Appellants.	LC No. 2011-122682-NO

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal by leave granted[1] the order granting in part and denying in part defendants' motion for summary disposition, in this premises liability, negligence, and statutory duty action. Because *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419; 751 NW2d 8 (2008) controls the disposition of this action, we reverse.

This litigation arises from plaintiff's slip and fall outside his apartment complex during a December 2012 winter storm. The record evidence included photographs showing the building exit. The exit way includes a concrete porch area immediately outside the building's door, which is located a few inches above a walkway. The walkway is, for all practical purposes, a sidewalk. Thus, while one has to "step" up or down from the walkway to the porch, there are no "steps" or stairs per se. It is on this walkway that plaintiff fell. He testified that after exiting the apartment building, he walked across the porch and stepped down to the walkway. He then walked about three-quarter of the length of the flat walkway before falling down.

[1] This Court granted defendants' motion for immediate consideration, denied defendants' application for leave to appeal, and denied defendants' motion for stay. *Garland v Hartman & Tyner, Inc*, unpublished order of the Court of Appeals, entered December 10, 2012 (Docket No. 313120). Following defendants' application for leave to appeal with the Michigan Supreme Court, on April 5, 2013, in lieu of granting leave to appeal, the Court entered an order remanding the case to this Court for consideration as on leave granted. *Garland v Hartman & Tyner, Inc*, 493 Mich 958; 828 NW2d 391 (2013).

The trial court granted defendants' motion for summary disposition of the premises liability and negligence claims. However, the trial court denied defendants' motion for summary disposition with regard to the statutory violation pursuant to MCL 554.139(1)(a). This appeal involves only the denial of the statutory violation claim that survived summary disposition.[2]

Defendants argue that the lower court erred in finding a genuine issue of material fact regarding whether the exit way outside plaintiff's apartment was fit for its intended use and provided plaintiff with reasonable access, as required by MCL 554.139(1)(a). We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court will only consider "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. A genuine issue of material fact exists "when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (internal quotation makes and citations omitted).

MCL 554.139(1)(a) states, in pertinent part, "(1) In every lease or license of residential premises, the lessor or licensor covenants: (a) That the premises and all common areas are fit for the use intended by the parties." The statute is to be liberally construed. MCL 554.139(3). Defendants are required, pursuant to MCL 554.139(1)(a), to ensure that the steps outside plaintiff's apartment are fit for their intended use, but perfect maintenance is not required. *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). This includes the duty to provide reasonable access to the area. *Allison*, 481 Mich at 429. The open and obvious defense is not available for defendants to avoid liability for a statutory duty. *Id*. at 425 n 2.

Our Supreme Court in *Allison*, addressed the analytical framework that is to be used in these types of cases. *Id*. at 428-431. After determining that the area in question is indeed a common area covered by the statute, a court is to identify the "purpose" for the common area. Then, a court is to determine whether the conditions made the common area unfit for its intended purpose. If so, then the landlord has breached its statutory duty. But as long as the premises are still fit for their intended purpose, no liability can attach. Thus, the issue before us is whether the

[2] The trial court granted defendants' motion for summary disposition of the statutory claim involving MCL 554.139(1)(b). Plaintiff did not file a cross-appeal challenging the trial court's order granting the dispositive motion in part, and therefore, we do not address it.

presence of one or two inches of snow on this area makes the area unfit for its intended use. While the "open and obvious" doctrine is implicated under common-law negligence principles, it is not implicated with respect to statutory duties. See *id.* at 425 n 2. Accordingly, whether the hazard that caused plaintiff to slip and fall was open and obvious is not relevant.

In *Allison*, the plaintiff slipped and fell while walking in the defendant's parking lot, which had one to two inches of accumulated snow on it. *Id.* at 423. After the plaintiff fell, he noticed that under the now-displaced snow, there also was a layer of ice. *Id.* The *Allison* Court recognized that the primary purpose of a parking lot is to store vehicles on it. *Id.* at 429. But it also stressed that it had a dual-purpose of allowing tenants to walk across the area to get to their vehicles. *Id.* Consequently, the Court held 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 (emphasis added).

The Supreme Court noted that the only evidence of the area's alleged unfitness was that (1) the area was covered with one to two inches of snow and (2) the plaintiff fell. *Id.* at 430. Under those facts, the plaintiff failed as a matter of law to show that tenants were unable to enter and exit the parking lot, park their vehicles, and, importantly, *access those vehicles*. *Id.* The Court noted that the plaintiff did not establish that the condition of the area "precluded access to his vehicle." *Id.*

The facts in the present case are remarkably similar to those in *Allison*. There is no question that the areas in question, the entry porch and adjacent walkway leading up to the front door of the apartment building, are "common areas" that fall under the duties imposed by MCL 554.139(1)(a). Plaintiff fell in a common area, the purpose of which was to allow tenants to walk from the parking lot to the apartment building. The only evidence that plaintiff provided to show that the area was unfit for that purpose was that there were one to two inches of snow and ice on the pavement and that plaintiff fell. As *Allison* held, this is insufficient to show that the conditions "precluded" tenants from walking through the common area. *Id.* In fact, plaintiff testified that at the time of his fall, he saw that another set of footprints was left by another person, which indicated that at least one other person was able to successfully traverse the area. In addition, plaintiff testified that after he fell, his wife and son came to his aid, which further demonstrated that others were able to walk to him without incident.[3] In short, just as in *Allison*, the fact that there was ice and a small accumulation of snow on the common area did not make

[3] It is unclear from plaintiff's testimony whether his nephew also assisted. But plaintiff's wife testified that the nephew was not one of the people assisting. Plaintiff's wife testified that she left the building and helped her husband stand up. It stretches the imagination to think that she took a circuitous route to get to her fallen husband, instead of simply walking in a straight line along the established walkway. Viewing the submitted photographs of the premises in conjunction with the testimony shows that the only reasonable inference is that she walked the same pathway as her husband. Moreover, there was no evidence presented to suggest that she took another route.

the area unfit for its intended purpose—people were not precluded from walking along the pavement paths and were able to get to and from the parking lot to the apartment building.

Plaintiff relies on *Hadden*, 287 Mich App 124, as support for the proposition that a material question of fact exists as to whether or not the exit way was fit for the uses intended. While *Hadden* is binding precedent, MCR 7.215(J)(1), it does not control the outcome of this case because *Hadden* is distinguishable from *Allison* on the basis that the common area in *Hadden* involved a staircase (instead of a parking lot) that was allegedly covered in invisible black ice[4] (as opposed to visible snow). *Id.* at 130-132. The *Hadden* Court stated:

> [T]he primary purpose of a stairway is to provide pedestrians reasonable access to different levels of a building or structure. Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use. [*Id.* at 132.]

Looking at the distinctions that the *Hadden* Court drew with *Allison*, it is clear that in the present case, the common areas do not involve staircases, the condition does not involve invisible black ice, and there is no allegation that the condition was caused by anything other than the natural accumulation of snow and ice. Thus, the relied-upon, distinguishing factors in *Hadden* are not present in the instant case, making *Hadden* not controlling.

Because our Supreme Court's decision in *Allison* controls the disposition of the action and the trial court erred in denying defendants motion for summary disposition, we reverse and remand for entry of summary disposition for the defendants. We do not retain jurisdiction. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

[4] "Black ice" has been defined as "invisible or nearly invisible, transparent, or nearly transparent" ice. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008).