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STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA JEFFREY-MOISE, Plaintiff-Appellee,	UNPUBLISHED February 18, 2021 APPROVED FOR PUBLICATION April 1, 2021 9:05 a.m.
v	No. 351813 Macomb Circuit Court LC No. 2019-000881-NO
WILLIAMSBURG TOWNE HOUSES COOPERATIVE, INC., Defendant-Appellant.	

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

GADOLA, J.

Defendant appeals on leave granted the order of the trial court denying its motion for summary disposition under MCR 2.116(C)(8) and (10) of plaintiff's claims of negligence and premises liability. We reverse and remand for entry of judgment in favor of defendant.

I. FACTS

This appeal arises from plaintiff's slip and fall on January 8, 2018. The facts underlying plaintiff's claim are essentially undisputed. On that day, plaintiff was a member and resident of defendant, Williamsburg Towne Houses Cooperative, Inc., a corporation operating a housing cooperative in St. Clair Shores, Michigan.

The housing cooperative is governed by its governing documents, being its Articles of Incorporation, Bylaws, and Occupancy Agreements. Each resident member of the cooperative purchases a membership in the cooperative, and thereby enjoys the right exclusively to occupy a housing unit, as well as to use the common areas of the cooperative's premises. In addition, each member has the right to participate in the operation and management of the cooperative.

Plaintiff's Occupancy Agreement with defendant provided that plaintiff had the right to occupy a specific unit under the terms of the agreement for three years, renewable for successive

three-year periods. The Occupancy Agreement further provided that defendant had the right to terminate plaintiff's membership upon notice to plaintiff four months before the expiration of the Occupancy Agreement. As a member of the cooperative, plaintiff could sell her membership interest or leave her membership interest to an heir through a will or trust only with the consent of the cooperative corporation. Similarly, plaintiff could sublet her individual unit only with the consent of the cooperative.

The Occupancy Agreement also required plaintiff to pay monthly fees to the cooperative for maintenance and administration of the cooperative. In addition, similar to a traditional landlord-tenant relationship, the cooperative could evict plaintiff if she breached the Occupancy Agreement. The Occupancy Agreement provides:

> The Member expressly agrees that there exists under this occupancy agreement a landlord-tenant relationship and that in the event of a breach or threatened breach by the Member of any covenant or provision of this agreement, there shall be available to [defendant] such legal remedy or remedies as are available to a landlord for the breach or threatened breach under the law by a tenant of any provision of a lease or rental agreement.

On January 8, 2018, at 10:00 p.m., plaintiff cleared snow from her personal walkway in the back of her townhome, then walked around the building on the community walkway toward the front of her townhome where she planned to clear snow from her front porch. While on the community walkway, plaintiff slipped and fell, severely injuring her ankle. Plaintiff testified that she fell on black ice that she described as being "the color of the sidewalk." She testified that before she fell she did not notice any ice on the walkway, and the walkway appeared only wet, but that after she fell she noticed what appeared to be patches of ice "all the way down" the walkway. She further testified that there was no snow on the walkway where she slipped and fell, but there was "lots of snow" on the grass.

Plaintiff's neighbor, Jennifer Jaber, stated that at approximately 10:00 p.m. on January 8, 2018, she saw plaintiff lying on the walkway. Jaber observed that in the area where plaintiff fell a patch of black ice spanned approximately 4 square feet. Jaber testified that the ice was not noticeable and looked like wet concrete. Jaber did not notice any salt on the walkway where plaintiff fell. Defendant's snow removal maintenance records for January 8, 2018, indicate that defendant's maintenance employees removed snow from streets and walkways within the housing cooperative between 7:30 a.m. and 2:30 p.m. that day, applying deicer to the walkways "where needed" during that period.

Plaintiff initiated this action, alleging in Count I of her complaint that defendant was liable under a theory of premises liability. Plaintiff asserted that as a tenant she was an invitee upon defendant's premises, that the icy condition of the sidewalk on which she slipped was not open and obvious, and that defendant had failed to keep the sidewalk fit for its intended use contrary to MCL 554.139. In Count II of her complaint, plaintiff alleged that defendant was liable under a theory of ordinary negligence, having breached its duty to use reasonable care and caution for her health, safety, and well-being, and to warn of dangerous conditions.

Defendant moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(8) and (10). Defendant contended that plaintiff's claim of premises liability failed because plaintiff, as a co-owner of the cooperative, was not on the land of another when she was injured. Defendant further contended that plaintiff's claims failed because the ice on which plaintiff slipped was open and obvious, and that plaintiff had not alleged a valid common law negligence claim.

After a hearing, the trial court denied defendant's motion. The trial court concluded that MCL 554.139 applied because plaintiff did not have possession and control over the cooperative's common walkway, and plaintiff's occupancy agreement established essentially a landlord-tenant relationship between the parties. The trial court further determined that a genuine issue of material fact existed regarding whether the condition upon which plaintiff fell was open and obvious. This Court thereafter granted defendant's application for leave to appeal.[1]

II. ANALYSIS

Defendant contends that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(8) and (10). We agree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint; we accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmovant. *Id*. at 159-160. A motion for summary disposition under MCR 2.116(C)(8) is properly granted when, considering only the pleadings, the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil*, 504 Mich at 160. When reviewing an order granting summary disposition under MCR 2.116(C)(10), this Court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citations omitted). We also review de novo the interpretation of statutes, *Cox v Hartman*, 322 Mich App 292, 298; 911 NW2d 219 (2017), and the trial court's determination whether a duty exists. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

[1] *Jeffrey-Moise v Williamsburg Towne Houses Cooperative Inc*, unpublished order of the Court of Appeals, entered March 12, 2020 (Docket No. 351813).

B. NEGLIGENCE

In her complaint, plaintiff asserts that defendant is liable under theories of both negligence and premises liability. Unlike a claim of premises liability, a claim of ordinary negligence is based on the underlying premise that a person has a duty to conform his or her conduct to an applicable standard of care when undertaking an activity. *Lymon v Freedland*, 314 Mich App 746, 756; 887 NW2d 456 (2016). To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of those damages. *Composto v Albrecht*, 328 Mich App 496, 499; 938 NW2d 755 (2019). The threshold question in a negligence action is whether the defendant owed a legal duty to the plaintiff, *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004), which is a question of law to be decided by the court. *Hill*, 492 Mich at 659. In a negligence action, if the plaintiff does not establish that the defendant owed the plaintiff a duty, summary disposition is properly granted to the defendant under MCR 2.116(C)(8). *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 441; 569 NW2d 836 (1997).

Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land. *Lymon*, 314 Mich App at 756. Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). Where it is alleged that the plaintiff's injuries arose from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence. *Id*. at 692.

In this case, a review of plaintiff's complaint as a whole reveals that plaintiff's claim is one of premises liability. Plaintiff alleges that a condition on defendant's land, i.e., a patch of black ice on the sidewalk, constituted a dangerous condition on the property that gave rise to her injury. Because plaintiff's claim is based on defendant's duty as the possessor of the land on which she fell, and not upon defendant's ability to conform to a particular standard of care, we treat plaintiff's claim as one of premises liability. See *id*. at 692. Although plaintiff alleges that the dangerous condition was created by the actions, or the failure to act, of defendant or its employees, that allegation does not transform a premises liability action into one of ordinary negligence. *Id*. Because plaintiff's claim sounds in premises liability, defendant was entitled to summary disposition of plaintiff's claim of ordinary negligence. See *id*.

C. PREMISES LIABILITY

Defendant contends that the trial court also erred when it denied defendant's motion for summary disposition of plaintiff's premises liability claim. Defendant argues that plaintiff can assert premises liability only if she was injured while on the land of another, and that because she was a member of the defendant housing cooperative, she was a co-owner of the cooperative and therefore was not on the land of another when she fell.

As noted, under Michigan law a distinction exists "between claims arising from ordinary negligence and claims premised on a condition of the land." *Lymon*, 314 Mich App at 756 (quotation marks and citation omitted). In a premises liability action, as in any negligence action,

the plaintiff must establish the elements of negligence, being (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Goodwin v Northwest Michigan Fair Ass'n*, 325 Mich App 129, 157; 923 NW2d 894 (2018). However, a claim of premises liability arises "merely from the defendant's duty as an owner, possessor, or occupier of land." *Lymon*, 314 Mich App at 756.

The initial inquiry when analyzing a claim of premises liability is to establish the duty owed by the possessor of the premises to a person entering the premises. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). The element of duty in a negligence action ordinarily is a question of law to be decided by the court. *Hill*, 492 Mich at 659. The duty a possessor of land owes to a person who enters upon the land depends upon whether the visitor is classified as an invitee, a licensee, or a trespasser.[2] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). An invitee is a person who enters upon the land of another by an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises and to make the premises safe for the invitee's presence. *Id.* A plaintiff will be deemed to be an invitee only if the purpose for which she was invited onto the owner's property was "directly tied to the owner's commercial business interests." *Id.* at 603-604. The possessor of land owes the greatest duty to an invitee, being the duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises. *Hoffner*, 492 Mich at 460. The possessor of the premises breaches that duty of care when he or she knows or should know of a dangerous condition on the premises of which the invitee is unaware, and fails to fix, guard against, or warn the invitee of the defect. *Lowrey v LMPS & LMPJ*, 500 Mich 1, 8; 890 NW2d 344 (2016). The plaintiff must demonstrate that "the premises possessor had actual or constructive notice of the dangerous condition at issue." *Id.* A premises possessor generally has no duty to remove open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

A licensee is a person who enters the land of another by the consent of the property possessor. *Stitt*, 462 Mich at 596. This category includes social guests. *Liang v Liang*, 328 Mich App 302, 311 n 5; 936 NW2d 710 (2019). "A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596. A possessor of land does not owe a duty to a licensee to inspect or to repair to make the premises safe for the licensee's visit. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004).

1. POSSESSION OF THE LAND

Plaintiff's complaint alleges that she was an invitee upon defendant's land when she fell. Defendant argues that to be deemed either an invitee or a licensee for purposes of premises liability

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[2] A trespasser is a person who enters upon another's land without the landowner's consent. *Stitt*, 462 Mich at 596. The possessor of land owes no duty to the trespasser except to refrain from injuring him by willful and wanton misconduct. *Id.* In this case, there is no suggestion that plaintiff was a trespasser.

plaintiff must have been on the land of another when she fell. Defendant argues that plaintiff, as a member of the housing cooperative, was a co-owner of the cooperative's premises and therefore was not on the land of another when she fell. In support of this argument, defendant relies upon *Francescutti v Fox Chase Condominium Ass'n*, 312 Mich App 640, 643; 886 NW2d 891 (2015). In *Francescutti*, the plaintiff, a condominium co-owner, slipped and fell on an icy sidewalk while walking his dog in a common area of the condominium complex. The plaintiff filed a premises liability action against the defendant condominium association alleging that he was an invitee with respect to common areas of the complex. The condominium association argued that the plaintiff was a licensee. This Court rejected both arguments, stating as follows:

> But neither the parties nor the trial court provide any authority for the proposition that the status of an owner of a condominium unit is either an invitee or a licensee with respect to the common areas of the development. Nor were we able to find any such authority. But this question can easily be resolved by looking at the definitions of those terms. "A 'licensee' is a person who is privileged to enter *the land of another* by virtue of the possessor's consent," while "[a]n 'invitee' is 'a person who enters upon *the land of another* upon an invitation . . .' "
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> The key to the resolution of this case is the phrase in both definitions, "the land of another." Plaintiff did not enter on "the land of another." Plaintiff is, by his own admission, a co-owner of the common areas of the development. Plaintiff's brief acknowledges that the condominium owners are co-owners as tenants in common of the common areas of the development. And because plaintiff is neither a licensee nor an invitee, there was no duty owed to plaintiff by defendant under premises liability. [*Id*. at 642-643 (footnote omitted).]

In this case, plaintiff slipped and fell while in a common area of defendant housing cooperative of which she was a member. A housing cooperative "is a form of real estate ownership in which those who occupy the premises do not own them." 3 Cameron, Michigan Real Property Law, § 26.28, p 1509. Cooperative housing can take various forms; a common form is corporate, with the corporation owning the fee to the real estate and individual cooperative members holding shares of stock in the corporation and receiving leases from the corporation to individual apartments. *Id*. The cooperative association retains exclusive control over the common areas of the cooperative, however, and only the cooperative association has authority to maintain the common areas. *Stanley v Town Square Cooperative*, 203 Mich App 143, 146; 512 NW2d 51 (1993). As a result, a member of a cooperative corporation has a hybrid relationship with the cooperative in which the member is a shareholder of the corporation that owns the real property, but is at the same time is a tenant of the corporation. Stated another way:

> "Cooperative ownership" is a form of ownership in which each owner of stock in a cooperative apartment building or housing corporation receives a proprietary lease on a specific apartment and is obliged to pay a rental which represents the proportionate share of operating expenses and debt service on the underlying mortgage, which is paid by the corporation. The cooperative apartment lease and the lessee's shares in the corporation that owns the apartment building are inseparable, and any transfer of one without the other is futile, and therefore ineffective. A cooperative housing association, comprised of the members who

> attain their membership by virtue of their purchase of stock in the association, creates a hybrid form of property ownership. The ownership of a cooperative membership, combined with the right to occupy a unit in the cooperative project, is a form of property ownership, even though cooperative owners do not directly hold the title to their properties; this form of home ownership is unlikely to have the economic value of fee simple ownership or a conventional long-term leasehold interest, but it has value and constitutes a right of property beyond mere possession. [15B Am Jur 2d, Condominiums and Cooperative Apartments § 56 (2020), (citations omitted).]

Similar to membership in a cooperative, ownership of a condominium unit entitles an owner to the exclusive possession of a unit and an undivided interest as tenants in common with other unit owners of the common areas of the condominium. 15B Am Jur 2d, Condominiums and Cooperative Apartments § 1 (2020). The basic difference between condominium and cooperative housing is that the individual purchasing a condominium takes title to the condominium unit while the individual purchasing a membership in a cooperative owns stock in a cooperative corporation and receives a lease for a specific unit for which the individual pays a regular amount to the corporation as a proportionate share of the operating expenses of the cooperative. See 5 Mich Civ Jur, Condominiums and Cooperative Housing, § 1. In Michigan, condominiums are governed by the Condominium Act, MCL 559.101, *et seq*., which provides that a condominium unit is the "portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, . . . " MCL 559.104(3), in which the purchaser is a co-owner who enjoys "an exclusive right to his condominium unit and has such rights to share with other co-owners the common elements of the condominium project as are designated by the master deed." MCL 559.163.

In this case, the parties do not dispute that plaintiff purchased a membership in the cooperative, which entitled her to lease living space from defendant, and to enjoy the use of all community property and facilities of the cooperative. Unlike the plaintiff in *Francescutti*, there is little support for the conclusion that plaintiff owned the land on which she fell. Plaintiff's purchase of a membership in the cooperative entitled her to occupy her townhome and entitled her to use the common areas of the cooperative, as long as she paid the required monthly fees and complied with the rules of the cooperative. Plaintiff was thus in a business relationship with the cooperative in which she purchased certain rights of occupancy from the cooperative by buying a membership in the cooperative.

Plaintiff's membership in the cooperative did not give her independent authority over the common areas of the cooperative typically enjoyed by an owner. In fact, the Occupancy Agreement precluded plaintiff, as a member, from making alterations to the common areas of the premises, including the sidewalks. By contrast, defendant retained control over the maintenance of the common areas of the cooperative, including authority over the removal of snow and ice in those areas. Defendant thus retained sufficient control and dominion over the common areas that it may be said that defendant was in possession of the common areas of the cooperative in contrast to plaintiff's membership right to use those areas. Because defendant was in possession of the cooperative's common areas, we conclude that plaintiff was on land that was in the possession of another when she fell.

2. OPEN AND OBVIOUS

Defendant contends that even if plaintiff were deemed to be an invitee upon the land of another when she fell, the ice upon which she slipped was an open and obvious condition, and defendant's duty did not extend to the removal of open and obvious dangers. We agree.

A premises possessor generally has no duty to remove open and obvious dangers. *Lugo*, 464 Mich at 516. The open and obvious doctrine is predicated on the strong public policy that people should take reasonable care for their own safety and precludes the imposition of a duty upon a premises possessor to take extraordinary measures to keep people safe from reasonably anticipated risks. *Buhalis*, 296 Mich App at 693-694. The premises possessor therefore does not owe a duty to protect from, or warn of, dangers that are open and obvious because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461. A premises possessor is not "an absolute insurer of safety" of either an invitee or a licensee, and accordingly, the premises possessor's duty does not extend to open and obvious dangers.[3]

Whether a dangerous condition is open and obvious "depends upon whether it is reasonable to expect that an average person with ordinary intelligence reasonably could be expected to discover it upon casual inspection." *Id.* This is an objective test in which the court considers "the objective nature of the conditions of the premises at issue." *Id.*, quoting *Lugo*, 464 Mich at 523-524. The court does not consider whether a particular plaintiff should have realized that the condition was dangerous, but rather whether a reasonable person in that position would have foreseen the danger. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). The open and obvious doctrine is not an exception to the duty owed by the premises possessor, but instead is an integral part of that duty; thus, the application of the open and obvious doctrine is part of the question of duty that is a question of law for the court to decide. *Buhalis*, 296 Mich App at 693.

In this case, applying the objective standard, and viewing the evidence in the light most favorable to plaintiff, the ice on which plaintiff slipped was open and obvious. "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis*, 296 Mich App at 694. With issues involving wintry conditions, "our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010), our Supreme Court explained:

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[3] A narrow exception exists when a "special aspect" of the open and obvious condition makes the risk unreasonable, thereby obligating the premises possessor to take reasonable steps to protect invitees from unreasonable risk of harm. *Hoffner*, 492 Mich at 461. A condition that is common or avoidable is not considered uniquely dangerous. *Id.* at 463. In this case, plaintiff does not allege the existence of a special aspect creating unreasonable risk of harm.

> The Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483[; 760 NW2d 287] (2008), which renders alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. [*Janson*, 486 Mich at 935.]

Thus, when there are sufficient "other indicia of a potentially hazardous condition," black ice is deemed open and obvious. *Id*. In this case, wintry conditions clearly were present at the time of plaintiff's fall. It was January in Michigan, the temperature was 32 degrees, and snow had been falling throughout the day. Plaintiff testified that the walkway where she fell appeared wet and there was "lots of snow" on the grass nearby. There were patches of ice on the sidewalk that both plaintiff and her neighbor testified were visible. In fact, both plaintiff and her neighbor testified they could see the patch of ice on which plaintiff fell following plaintiff's fall. The wintry conditions presented indicia of a potentially hazardous condition on the walkway sufficient to alert an average user of ordinary intelligence to discover the danger upon casual inspection. The black ice on which plaintiff fell was therefore open and obvious.

In denying defendant's motion for summary disposition, the trial court noted that the ice on which plaintiff fell reportedly had no deicer on it. The trial court concluded that the ice therefore apparently was not open and obvious to the person distributing the deicer.[4] This Court has observed, however, that "[t]he overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent." *Slaughter*, 281 Mich App at 483. Thus, regardless of whether defendant's maintenance employees saw the black ice, the indicia of a potentially hazardous condition on the walkway was sufficient to alert an average user of ordinary intelligence to discover the danger upon casual inspection, and the black ice therefore created a condition that was open and obvious. The trial court therefore erred in determining that an issue of fact existed regarding the open and obvious nature of the black ice.

3. MCL 554.139

Defendant also contends that the trial court erred by denying its motion for summary disposition on the basis that defendant breached its duty to keep the walkway fit for the use intended as required under MCL 554.139(1)(a). We agree.

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[4] However, plaintiff testified that after she fell, she noticed patches of black ice on the sidewalk. Similarly, Jaber testified that she saw patches of black ice on the sidewalk where plaintiff fell, and one of the emergency medical workers responding to the scene also apparently saw the ice because he warned a coworker to avoid the ice.

In addition to the general common law duties that a possessor of land owes to invitees, MCL 554.139 imposes further covenants and duties on landlords who lease or license their property to residential tenants. 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.

The statutory protection of MCL 554.139(1) "arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The statute thus provides "a specific protection to lessees and licensees of residential property *in addition* to any protection provided at common law." *Id*. The open and obvious doctrine is not available to preclude liability for a violation of MCL 554.139(1). *Benton v Dart Properties, Inc*, 270 Mich App 437, 441; 715 NW2d 335 (2006).

In *Francescutti*, this Court determined that MCL 554.139 did not apply where the plaintiff was the owner of a condominium unit in the defendant condominium development because the statute imposes a duty only upon a lessor of land. *Francescutti*, 312 Mich App at 642. This Court reasoned that although the plaintiff in that case had the right to use of the common areas of the condominium, the defendant had not leased the common areas to the plaintiff. In this case, although defendant is a cooperative and not a condominium, nonetheless the relationship between plaintiff and defendant is not strictly that of lessor of land and tenant. As a member of defendant cooperative, plaintiff has a hybrid ownership interest in which she leases her housing unit; however, plaintiff also is a member of the cooperative and the cooperative's corporation owns the real property of the cooperative including the common areas. As in *Francescutti*, it cannot be said that defendant in this case leased the common areas of the cooperative to plaintiff, nor that plaintiff acquired the use of the common areas by her lease of her unit in the cooperative; rather, plaintiff acquired the use of the common areas by her purchase of a membership in the cooperative.[5]

Moreover, even if MCL 554.139(1)(a) were applicable to defendant in this case, plaintiff did not create a genuine issue of fact regarding whether the sidewalk was in a condition that rendered it unfit for its intended use. MCL 554.139(1)(a) does not require lessors to maintain a common area in ideal, or even the most accessible, condition possible. *Allison*, 481 Mich at 430.

[5] Plaintiff argues for the first time on appeal that MCL 554.139 applies to defendant by way of the Truth in Renting Act, MCL 554.631 *et seq*. This issue is therefore unpreserved. See *Elahham v Al-Jabban*, 319 Mich App 112, 119; 899 NW2d 768 (2017). Because this Court generally will decline to address an unpreserved issue unless a miscarriage of justice will result from the failure to do so, the question is one of law and the facts necessary to resolve the issue have been presented, or it is necessary to do so for the proper determination of the case, *Autodie, LLC v City of Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014), we decline in this case to review this unpreserved issue.

Rather, the statute requires the lessor to maintain a common area in a condition that renders it fit for its intended use. *Id*. Here, plaintiff did not establish that a genuine issue of material fact existed regarding whether the sidewalk was fit for its intended use. Plaintiff testified that the walkway was clear of snow and the lighting where she fell was good. She testified that after she fell, she noticed patches of ice of the sidewalk. Plaintiff's neighbor similarly testified that she noticed patches of ice on sidewalk. Accordingly, plaintiff demonstrated only that sidewalk had patches of ice, which at most indicated inconvenience of access or that the sidewalk was not in peak condition, but did not render the sidewalk unfit for its intended purpose. See *Allison*, 481 Mich at 430.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Karen M. Fort Hood
/s/ Anica Letica