STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE DeGENNARO,

Plaintiff-Appellant,

v

RIVET HOLDINGS INC, WAVELAND PROPERTY MANAGEMENT LLC, and BIRCH CREEK CONDOMINIUMS ASSOCIATION INC,

Defendants-Appellees.

UNPUBLISHED
August 26, 2021

No. 354054
Kent Circuit Court
LC No. 2019-005028-NO

Before: RONAYNE KRAUSE, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Lawrence DeGennaro, appeals by right the trial court's order granting summary disposition in favor of defendants Rivet Holdings, Inc ("Rivet"), Waveland Property Management, LLC ("Waveland"), and Birch Creek Condominiums Association, LLC ("the Association"). This matter arises out of injuries plaintiff sustained when he slipped and fell on ice at the end of his driveway. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND

Plaintiff leases a unit in the Birch Creek Condominium complex. The unit is owned by Rivet, which also owns ten out of the fourteen total units in the complex. Rivet is solely owned by Douglas Geerlings, who seemingly also essentially runs the Association by virtue of Rivet's majority ownership of the units. Waveland is retained by Rivet to act as the landlord for the units Rivet owns. The condominium units are arranged around a cul-de-sac road, Birch Creek Court, and from there are only accessible over their driveways. Although the units have sidewalks running from their front doors to their driveways, there are no other sidewalks in the complex. The driveways are considered a "Limited Common Element" pursuant to the complex map attached to the Birch Creek Condominiums Master Deed.

The Birch Creek Condominium Association is responsible for snowplowing Birch Creek Court and all units' driveways, but the individual owners and tenants are responsible for shoveling snow from the sidewalks. The Association retained Hoffman Lawn Care to remove snow from

the road and the driveways. The tenants who occupied Rivet's units were instructed to contact Waveland if the tenant had any problem with snow or ice, and Waveland would then contact Geerlings. Geerlings and Kimberly Raak, an employee with Waveland who was seemingly the Birch Creek tenants' primary point of contact with Waveland, testified that neither had received any complaints about snow and ice removal before February 2019, but plaintiff testified that he had made numerous complaints because his driveway was not plowed. Another tenant in the complex testified that snow and ice removal was initially not a problem when she moved in, but it got gradually worse over time. Plaintiff, who was 65 years old when the fall occurred, explained that "[w]e just started doing it ourselves." Generally, plaintiff would personally shovel the driveway and then apply salt, based on a visual inspection for whether the surface looked icy.

On February 15, 2019, plaintiff woke up at 3:00 a.m., as was usual, noted that it was not snowing, and learned from the television news that the temperatures were expected to drop throughout the day. Plaintiff had put some salt on his driveway the previous day, February 14, 2019, but "the plow had dragged back and they don't clear it all the way, they just smear it and it was packed down pretty hard." Plaintiff had noted on the 14th that the salt had only been partially effective, because the ice had melted and then refrozen because the temperatures were dropping. Therefore, he knew that night that his driveway was still partially icy. However, on the morning of the 15th, when plaintiff left at about 4:00 a.m., the ice appeared to be melting. There was still some snow and ice on the driveway, and the driveway "looked wetter." Plaintiff admitted he knew that the projected decreasing temperatures on the 15th could cause the meltwater on his driveway to refreeze. However, he emphasized that he did not know how long he would be out, so he did not know whether he would need to work on the driveway personally or whether the plow company would be through. He nevertheless agreed that he had no expectation that anyone else would come and maintain his driveway that day.

Plaintiff returned home "somewhere close to noon." As he returned home, he noticed that the street was "hard ice" because the dropping temperatures had refrozen anything that had melted, including tire tracks. There had been no fresh snowfall, but the roads had been slushy in the morning and were now frozen to hard ice. He observed that his driveway was "more frozen" and not obscured by any snow, and he agreed that based on his experience, he knew it would be icy. Plaintiff pulled into his garage and was going to retrieve his groceries from the trunk of his car. However, his neighbor "straight across" Birch Creek Court yelled at him from the end of her driveway that she had locked her keys in her running car. Plaintiff happened to have a "Slim Jim" device for opening locked cars in his garage, which he found after approximately ten minutes of looking.

Plaintiff agreed that at that time, he was aware that his driveway was covered in ice and that he could have salted it. Plaintiff observed that his driveway was completely frozen over, but that his driveway was the only way to get out. Although some patches of the driveway were covered with packed snow, he knew there "could be ice under the parts that are packed too." Plaintiff did not tell his neighbor that he could not help her due to the dangerousness of his driveway. Plaintiff also made no attempt to remove the snow and ice from his driveway. Plaintiff agreed that he voluntarily traversed the driveway despite knowing that it was hazardous, and he was not obligated to walk down his driveway. Although there was grass next to a portion of his driveway, he explained that it was impossible to get to the road without walking across either his or a neighbor's driveway because the driveways intersected. We note that plaintiff's contention is

supported by the map of the complex attached to the Master Deed. Plaintiff carefully walked almost to the end of his driveway when he abruptly "slid up in the air" and landed on the ground. Plaintiff agreed that the driveway was obviously covered by snow and ice, and he was not surprised to discover ice at the end of his driveway. Plaintiff's neighbor testified that her driveway was also covered in snow and ice, and the road was even worse. Plaintiff suffered serious injuries to his ankle and leg.

Plaintiff commenced this action on June 13, 2019, approximately four months after the fall, initially naming only Rivet and Waveland as defendants. The parties quickly stipulated to add the Association. Plaintiff alleged theories of premises liability and violation of MCL 554.139[1] by failing to provide proper snow removal and salting services. Each of the defendants moved for summary disposition, which the trial court ultimately granted as to all claims solely on the ground that plaintiff had admitted the hazardous ice on his driveway to have been open and obvious, and the hazard was neither unreasonably dangerous nor effectively unavoidable. This appeal followed.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). All three defendants moved for summary disposition pursuant to MCR 2.116(C)(10), and the Association also moved for summary disposition pursuant to MCR 2.116(C)(8). The trial court did not identify which subrule was the basis for its grant of summary disposition, but because it clearly considered evidence outside the pleadings, it is presumed to have granted summary disposition pursuant to MCR 2.116(C)(10). *Hill v Sears, Roebuck and Co*, 492 Mich 651, 659 n 15; 822 NW2d 190 (2012). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Appellate courts will affirm a right result arrived at on the basis of wrong reasoning. *Kirl v Zinner*, 274 Mich 331, 336; 264 NW 391 (1936); *Fox v Roethlisberger*, 350 Mich 1, 4; 85 NW2d 73 (1957); *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

III. STATUTORY CLAIMS

Plaintiff first argues that the trial court erred in granting summary disposition as to his statutory claims. We agree in part.

Pursuant to MCL 554.139, landlords are obligated "to keep the premises and common areas fit for their intended use and to keep the premises in reasonable repair." *Allison v AEW Capital*

[1] This statute generally imposes certain requirements upon lessors of residential premises to keep those premises fit and safe for use.

Mgmt, LLP, 481 Mich 419, 425; 751 NW2d 8 (2008). The statute specifically provides, in its entirety:

> (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.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (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.

As defendants argue, and as plaintiff tacitly admits, "common areas" are distinct from "the premises," and landlords are not obligated under MCL 554.139(1)(b) to keep "common areas" in reasonable repair. *Allison*, 481 Mich at 431-432. Rather, landlords are only obligated under MCL 554.139(1)(a) to keep "common areas" "fit for the use intended by the parties." *Id*. at 427-428, 433.

As an initial matter, the trial court erred as a matter of law when it dismissed plaintiff's statutory claims on the basis of its openness and obviousness analysis. Open and obvious doctrine is simply not applicable to a claim brought under MCL 554.139. *Royce v Chatwell Apartments*, 276 Mich App 389, 397-398; 740 NW2d 547 (2007); *Est of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289; 933 NW2d 732 (2019). However, plaintiff admits that only Waveland is his "lessor." Therefore, only Waveland can be subject to liability under MCL 554.139. *Francescutti v Fox Chase Condo Ass'n*, 312 Mich App 640, 642; 886 NW2d 891 (2015). The trial court coincidentally was correct in granting summary disposition in favor of Rivet and the Association as to plaintiff's claims under MCL 554.139.

Plaintiff also admits that the driveway is a "common area." As noted above, the complex map attached to the Master Deed explicitly shows the driveways and sidewalks to be "Limited Common Elements," as distinguished from the unit buildings and from "General Common Elements." We are unaware of any authority distinguishing "limited" from "general" common areas for purposes of MCL 554.139. Nevertheless, we are satisfied that plaintiff's concession is appropriate. See *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969).

Therefore, it is not disputed that Waveland was obligated to keep plaintiff's driveway fit for its intended use pursuant to MCL 554.139(1)(a). Our Supreme Court has explained that an accumulation of ice and snow is generally not considered a defect that would require repair under

MCL 554.139(1)(b), and the obligations imposed under MCL 554.139(1)(a) are even "less onerous." *Allison*, 481 Mich at 433-435. However, our Supreme Court explicitly cautioned that rectifying snow and ice accumulation in common areas is not *per se* outside a landlord's duties. *Id*. at 438. "There are conceivable circumstances in which a lessor may have a duty to remove snow and ice under MCL 554.139(1)(a), such as when the accumulation is so substantial that tenants cannot park or access their vehicles in a parking lot." *Id*. Importantly, in *Allison*, "neither of the parties ha[d] indicated that the intended use of the parking lot was anything other than basic parking and reasonable access to such parking." *Id*. at 429-430.

We find especially concerning that, however the driveways are labeled, they are the only way into or out of the condominium tenants' properties. We reject defendants' contention that plaintiff could have walked on the grass, a contention unsupported, and possibly contradicted, by the record evidence. We think this case presents an exceptional circumstance under which we should consider an unpublished case persuasive. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 232 n 4; ___ NW2d ___ (2020). In *Hendrix v Lautrec, Ltd*, unpublished per curiam opinion of the Court of Appeals, decided October 27, 2016 (Docket No. 328191), unpub op at 3, this Court analyzed "the use intended by the parties" for a connected row of driveways. The majority noted that the driveways at issue, which the parties agreed were common areas, were actually used for pedestrian access and were therefore "more akin to sidewalks" than to parking lots. *Hendrix*, unpub op at pp 3-4. In *Hendrix*, the "tenants routinely walk[ed] across neighboring driveways to reach their units." *Id*., unpub op at p 1. "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 garages and pedestrian access to the residential units." *Id*., unpub op at p 4. Here, the facts are even more stark: *Hendrix* indicated that the tenants had other access options available, whereas here, the tenants can only access their units by traversing their driveways, whether by vehicle or by foot. Furthermore, the complex map shows that this is by design. It necessarily follows that the "use intended by the parties" includes pedestrian travel.

To the extent the driveways are effectively sidewalks, they are therefore unambiguously considered "common areas." *Benton v Dart Properties, Inc*, 270 Mich App 437, 443-444; 715 NW2d 335 (2006); *Est of Trueblood*, 327 Mich App at 289-290. The mere presence of ice on a sidewalk is not enough to render the sidewalk unfit for its intended use. *Est of Trueblood*, 327 Mich App at 290; *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351813), slip op at pp 10-11. Nevertheless, the purpose of a sidewalk is "walking on it," and a sidewalk that is entirely covered in ice does render the sidewalk unfit for its intended use. *Benton*, 270 Mich App at 444; *Est of Trueblood*, 327 Mich App at 290-292. The fact that the ice was open and obvious is irrelevant. The fact that other people were able to successfully navigate the sidewalk may create a question of fact regarding the sidewalk's usability, but it is not dispositive. *Est of Trueblood*, 327 Mich App at 292.

Because the evidence shows that plaintiff's driveway was intended for both vehicular *and* pedestrian travel into and out of his property, and because the evidence shows that the driveway was totally covered with ice, there is a genuine question of fact whether Waveland breached its duty under MCL 554.139(1)(a) to maintain the driveway in a manner consistent with its intended

use. The trial court erred in granting summary disposition in favor of Waveland as to plaintiff's statutory claim.[2]

IV. PREMISES LIABILITY

Plaintiff also argues that the trial court erred in granting summary disposition as to his premises liability claims. We disagree.

As an initial matter, plaintiff ostensibly brought claims of negligence or premises liability. However, "Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land." *Jeffrey-Moise*, ___ Mich App at ___, slip op at p 4. "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." *Id*., see also *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). Plaintiff's non-statutory claim clearly sounds in premises liability because it is based on a dangerous condition on the property and on the defendants' duties as owners or possessors of the land. *Jeffrey-Moise*, ___ Mich App at ___, slip op at p 4. Nevertheless, it is clear from the proceedings that plaintiff did not really seek two parallel claims, one sounding in negligence and the other sounding in premises liability; rather, it appears that the parties appropriately ignored plaintiff's label and treated it as only a premises liability claim.

Under premises liability law, landlords are obligated to exercise reasonable care to protect their tenants from unreasonable risks of harm caused by dangerous conditions on the land. *Est of Trueblood*, 327 Mich App at 285. However, "[a]bsent special aspects, this duty does not extend to open and obvious dangers." *Id*. In general, snow and ice is considered open and obvious. *Id*. Even if it were not, the evidence unambiguously establishes that the condition of plaintiff's driveway was, in fact, open and obvious. Plaintiff does not dispute that the hazardous condition was open and obvious, and indeed actually known to him, but rather argues that there were "special aspects" that would avoid application of open and obvious doctrine.

As alluded to above, plaintiff explained that he could have walked on the grass parallel to, but not on, his driveway partway to the road. However, he could not do so entirely, because all of the driveways intersected, so he would have still needed to traverse an ice-covered driveway at some point. The evidence reflects that all of the driveways were icy, and the road was even worse. Furthermore, as noted, the complex map attached to the Master Deed also shows that there was no grass extending all the way to the road. The record does not reflect defendants having offered any contrary evidence, such as an aerial photograph. Conversely, plaintiff suggests that the snow was "knee deep" elsewhere in the yard, which we also cannot find substantiated in the record. Nevertheless, it is readily apparent from the present record that plaintiff could not, in fact, have gotten to the road without facing the ice hazard.

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[2] Waveland argues that plaintiff would be limited to a contractual remedy in the event he could establish a violation of MCL 554.139(1)(a). However, plaintiff's possible remedy is not the same inquiry as Waveland's possible liability, and the nature of that possible remedy is not properly before us. Waveland may make an appropriate argument regarding possible remedies on remand.

This Court has explained that an "effectively unavoidable" danger does not need to be an "unreasonable" danger. *Attala v Orcutt*, 306 Mich App 502, 505-506; 857 NW2d 275 (2014). Plaintiff places great emphasis on *Attala*, thereby implicitly conceding that the ice on his driveway was not "unreasonable." In *Attala*, this Court held that ice on a parking lot was "effectively unavoidable" for a student trying to enter her car so she could go to class, based on the parties' stipulation that the student "had to encounter the ice on the surface of the parking lot" and the defendants' failure to argue that the hazard was not effectively unavoidable. *Id*. at 504, 506-507. Therefore, the *Attala* Court's conclusion is only minimally applicable to this matter. Our Supreme Court recently explained that a hazard may be effectively unavoidable if an employee cannot practically enter the employee's place of employment for purposes of work without confronting the hazard. *Est of Livings v Sage's Investment Group LLC*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 159692), slip op at pp 6-16.[3] The record reflects that plaintiff worked as a driver for Uber, not as a locksmith or a mechanic, and there is no indication that plaintiff was contractually obligated to assist his neighbor.

We find it fatal to plaintiff's claim that, as the trial court observed, his decision to traverse the driveway to help his neighbor was "hospitable but also discretionary." The record suggests that the hazard might have been effectively unavoidable if plaintiff had truly needed to leave his property on foot. However, we need not decide that question. Unlike the student in *Attala* or the employee in *Est of Livings*, plaintiff was not in need of getting to class or to his place of employment with no other route practically available to him. Rather, plaintiff could have left by using his car, which was safely parked in his garage and not alleged to have become inoperable after parking, so he was not truly "trapped" by the hazardous conditions. The fact that plaintiff had a right or a desire to leave his property on foot does not, by itself, establish that the hazard was effectively unavoidable. See *Hoffner v Lanctoe*, 492 Mich 450, 471-473; 821 NW2d 88 (2012). We have discovered no case law, nor has plaintiff offered any, to the effect that a moral or social obligation, however commendable, is sufficient to make a hazard effectively unavoidable.

Because plaintiff was not required to traverse his driveway on foot, the hazardous condition of the snow and ice was not "effectively unavoidable" for purposes of premises liability. It is therefore not necessary to resolve which entity was in possession and control of the property. The trial court properly granted summary disposition as to plaintiff's premises liability claims.

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[3] *Est of Livings* partially overruled this Court's case of *Lymon v Freedland*, 314 Mich App 746, 749-753, 761-764; 887 NW2d 456 (2016), in which the plaintiff was a home health care aid for a patient who could not be abandoned, and it was established that there were probably no viable routes into the patient's home that did not involve partially traversing a completely ice-covered driveway. This Court found a question of fact whether the hazard of the icy driveway was effectively unavoidable on those facts. *Id*. at 763-764. In *Est of Livings*, our Supreme Court repudiated this Court's resort to evaluating "whether a particular job is 'important' enough to justify, to the judges' minds, risking a hazardous condition." *Est of Livings*, ___ Mich at ___ n 16, slip op at p 16 n 16. However, *Est of Livings* nevertheless noted that "courts can consider the consequences of failing to attend work or breaching other employment requirements, and those consequences may differ depending on the urgency of the work." *Id*.

Summary disposition in favor of Waveland is reversed as to plaintiff's statutory claim only. In all other respects, we affirm, albeit on partially different grounds from those relied upon by the trial court. This matter is remanded for further proceedings. We do not retain jurisdiction. We direct that the parties shall bear their own costs on appeal. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Jane M. Beckering

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BOONSTRA, J. (*concurring*).

I concur in the result reached by the majority. I write separately because I cannot ascribe to what in my view is the majority's overly broad description of this Court's holding in *Attala v Orcutt*, 306 Mich App 502, 505-506; 857 NW2d 275 (2014), or to the majority's intimation that an open and obvious hazard might be effectively unavoidable whenever a plaintiff "truly needed to leave his property on foot," an imprecise and ambiguous standard to say the least.[1] I fully appreciate that our Supreme Court appears to be whittling away at the "special aspects" exception to our "open and obvious" jurisprudence, and specifically to its "effectively unavoidable" prong. See *Est of Livings v Sage's Investment Group LLC*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 159692). And the Supreme Court may be laying the groundwork for upending that jurisprudence entirely. However, unless and until our Supreme Court overrules its prior

[1] Our Supreme Court in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001), offered, as an illustration of an effectively unavoidable hazard, "a commercial building with only one exit for the general public where the floor is covered with standing water," forcing a customer who wished to leave to confront the hazard. Nothing in our existing caselaw provides that a hazard may be deemed effectively unavoidable whenever a plaintiff perceives a good reason to navigate it, or simply because some methods of egress may require a plaintiff to confront the hazard.

precedents, see, e.g., *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012); *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), I will continue to follow them.

/s/ Mark T. Boonstra