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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

08-27-14

Visible 1-2" accumulation of snow and ice does not render a walkway "unfit for its intended purpose" under the Landlord-Tenant Act.

By Drew Broaddus

Attorneys representing businesses and their insurers have become very familiar with the "open and obvious doctrine" of *Lugo v Ameritech Corp,* 464 Mich 512 (2001).[1] In residential tenant claims, plaintiffs frequently try to avoid this defense by arguing that the defendant breached a statutory duty under the Landlord-Tenant Act, MCL 554.139(1). Such arguments are often premised upon the Supreme Court's statement in *Allison v AEW Capital Mgmt,* 481 Mich. 419, 426 (2008) that "a defendant cannot use the 'open and obvious' danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises…." MCL 554.139(1) has limits, however; it is not an automatic end-run around the open and obvious defense when the plaintiff is a renter. The Court of Appeals recently underscored the limitations of § 139(1) in *Garland v Hartman & Tyner, Inc,* unpublished opinion per curiam, rel'd 7/22/14 (No. 313120).

In *Garland,* the plaintiff slipped and fell outside his apartment complex during a December 2012 winter storm. The exit way plaintiff fell on included a concrete porch area immediately outside the building's door, which was located a few inches above a walkway/sidewalk. One had to step up or down from the walkway to the porch; there were no steps or stairs. Plaintiff 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.

SECREST WARDLE NOTES:

The fact that MCL 554.139(1)(b) does not extend to common areas is critical (and many times, dispositive) in these type of cases because § 139(1)(b) imposes a more stringent duty on the landlord – a duty to maintain the premises in "reasonable repair" – in comparison to § 139(1)(a), which merely requires that the premises be fit for its intended purpose.

It is logical that conditions held to be open and obvious as a matter of law generally will not violate § 139(1)(a), since a finding that the open and obvious doctrine applies also implies that the condition presents no special aspects (in other words, it is not "unreasonably dangerous"), and *Allison, supra* at 429-430 held that a lessor only breaches its duty under § 139(1)(a) in "exigent circumstances." A condition that is not "unreasonably dangerous" probably does not constitute an exigency either.

Plaintiff sued his landlord under a common law premises liability theory. Perhaps anticipating the open and obvious defense, plaintiff also claimed that his landlord had violated its statutory duties under MCL 554.139(1)(a) and (b) to maintain the premises and all common areas in a condition fit for their intended use, and to keep the premises in reasonable repair.

The trial court granted defendant's motion for summary disposition as to the common law premises liability claim, but found a question of fact as to "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)." *Garland, supra* at *2. (The trial court found that the plaintiff did not have a viable claim under § 139(1)(b), and the plaintiff did not cross-appeal from that ruling, so it was not an issue on appeal, *Id.* at *2 n 2.)

[1] See *Boundaries*, July 21, 2014, "Snow-Covered Curb Is Open And Obvious With No Special Aspects," by Drew Broaddus.

The landlord filed an application for leave to appeal, arguing that the plaintiff's claim under § 139(1)(a) should have also been dismissed on summary disposition. The Court of Appeals initially denied interlocutory review, but was later directed by the Michigan Supreme Court to consider the case on its merits. *Garland, supra* at *1 n 1.

On remand from the Supreme Court, the Court of Appeals agreed with the landlord, finding that "one to two inches of snow and ice on the pavement" was not enough to support a cause of action under § 139(1)(a). *Id.* at *3. The panel explained:

> …*Allison* … addressed the analytical framework that is to be used in these types of cases. 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 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….
>
> 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. After the plaintiff fell, he noticed that under the now-displaced snow, there also was a layer of ice….
>
> 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. 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…. *Garland, supra* at *2-3 (citations omitted).

The *Garland* panel found the facts of this case to be "remarkably similar to those in *Allison.*" *Id.* at *3. In *Garland* the areas in question – the entry porch and adjacent walkway leading up to the front door of the apartment building – were undeniably "common areas" that fell under § 139(1)(a). Mr. Garland 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 1-2" 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. The panel further noted that in this case, there was evidence that other people had walked through the area shortly before and shortly after Mr. Garland's fall without incident.

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