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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

An Owner of a Condominium Unit Cannot Invoke the Landlord-Tenant Act

By: Drew W. Broaddus **October 28, 2015**

SECREST WARDLE NOTES

Snow and ice are generally open and obvious and do not present special aspects. *Hoffner v Lanctoe*, 492 Mich 450, 456 (2012); *Cole v Henry Ford Health System*, 497 Mich 881 (2014). Therefore, creative attempts to invoke the Landlord-Tenant Act are more often seen in these type of cases.

The panel's rejection of plaintiff's argument under the Landlord-Tenant Act makes sense when one considers that the duties established by MCL 554.139 presuppose the existence of a residential lease. See *Mullen v Zerfas*, 480 Mich 989, 990 (2007). "The covenants created by the statute establish duties of a lessor or licensor of residential property to the lessee or licensee of the residential property, most typically of a landlord to a tenant." *Id.*

* * * *

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 (or other defenses that sound in premises liability). The Court of Appeals recently underscored some of the limitations of § 139(1) in a published opinion, *Francescutti v Fox Chase Condo Ass'n*, ___ Mich App ___ ; ___ NW2d ___ (2013) (Docket No. 323111).

In *Francescutti*, the plaintiff was a co-owner of a condominium unit in defendant's Fox Chase development. One evening in February 2013, at approximately 11:00 p.m., while walking his dog, the plaintiff slipped and fell on an icy, snow-covered sidewalk located in a common area of the development. Plaintiff claimed

[1] See *Boundaries*, August 27, 2014, "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.

that he was seriously injured in the fall and filed suit, alleging negligence and breach of contract. Defendant Fox Chase moved for summary disposition, arguing that the condition was open and obvious (which defeated the negligence claim) and that there was no contractual duty to remove the snow and ice from the common area. The trial court agreed and granted summary disposition. Plaintiff appealed by right. The Court of Appeals unanimously affirmed.

Plaintiff first argued that the trial court erred in dismissing the negligence claim because defendants had a duty under MCL 554.139 to maintain the property in reasonable repair. The panel disagreed, noting that "MCL 554.139 imposes such a duty on the lessor of land. Defendants are not lessors of land leased to plaintiff. Plaintiff is an owner of a condominium unit in the Fox Chase condominium development." *Francescutti,* ___ Mich App at ___; slip op at 3. Plaintiff argued that he should be able to invoke MCL 554.139 because "under MCL 559.136 of the Michigan Condominium Act, he is a tenant in common of the common areas of the development. And because that makes him a 'tenant,' that must make defendant a 'lessor' of the land." *Id.* The panel rejected this argument as "a semantic slight-of-hand," noting that the defendant was "not leasing the common areas to plaintiff under a lease and, therefore, it [was] not a 'lessor' under MCL 554.139 and that statute is not applicable to this case." *Id.*

Although not discussed in the opinion, it should be noted that there are actually two distinct components to the Landlord-Tenant Act, MCL 554.139(1)(a) and (1)(b). Section 139(1)(a) imposes a duty to ensure that "the premises and all common areas are fit for the use intended by the parties." Section 139(1)(b) imposes a duty 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." Section 139(1)(b) does not apply to common areas. *Allison v AEW Capital Mgmt, LLP,* 481 Mich 419, 429 (2008). Here the plaintiff's accident occurred in a common area (specifically, a sidewalk). *Francescutti,* ___ Mich App at ___; slip op at 1. Therefore, only Section 139(1)(a) could have even arguably been applicable in *Francescutti.*

Having determined that the Landlord-Tenant Act is inapplicable, the panel then rejected plaintiff's other arguments in short order. First, the panel found that plaintiff's claim sounded exclusively in premises liability rather than ordinary negligence[2] and therefore failed based on the plaintiff's status on the land.[3] The panel found no "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." *Francescutti,* ___ Mich App at ___; slip op at 2. "Plaintiff did not enter upon 'the land of another.' Plaintiff is, by his own admission, a co-owner of the common areas of the development. … [B]ecause plaintiff is neither a licensee nor an invitee, there was no duty owed plaintiff by defendants under premises liability." *Id.* The panel also found that the plaintiff's breach of contract claim was, at bottom, "nothing more than a restatement of his premises liability claim." *Id.* at 3. Plaintiff did not identify any "contract language that would establish a contractual duty that was breached." *Id.*

[2] Although the panel did not cite them, this result was compelled by *Kachudas v Invaders Self Auto Wash,* 486 Mich 913 (2010) (where a plaintiff "was allegedly injured … by a condition of the land … his claim sounds exclusively in premises liability") and *James v Alberts,* 464 Mich 12, 18–19 (2001).

[3] See *Boundaries,* March 30, 2015, "Michigan Legislature Codifies Property Owners' Duties With Respect to Trespassers," by Drew Broaddus.

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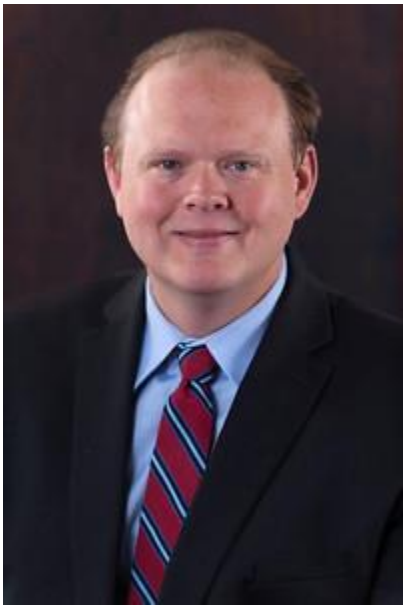

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