

## What is Fit? Michigan Supreme Court Continues to Shake Up Premises Liability

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The underlying facts and claims of this premises liability case are all too familiar. Plaintiff, Jan Bowerman, a resident of Stanton Park Apartments, an apartment complex for elderly and disabled persons, tripped on a small trench located around a newly poured raised concrete slab where the dumpster was located, injuring her ankle. The apartment complex was managed by Red Oak Mgt Co. *Bowerman v Red Oak Mgt Co, Inc*, \_\_\_ Mich \_\_\_; \_\_\_ NW3d \_\_\_ (2026) (Docket No. 167718); slip op. 2-4. Prior to Plaintiff's injury, Red Oak had contracted with Westveld Services, LLC to replace concrete throughout the community. *Id.*, slip op. 2. Red Oak also contracted with Bob's Asphalt & Paving, Inc. to fill in the areas of newly poured concrete with asphalt. *Id.*, slip op. 3. Westveld replaced a concrete slab platform under a dumpster in the parking lot area, leaving a small trench that circumvented the perimeter of the new concrete slab. *Id.* Westveld did not fill in the trench because another contractor, Bob's Asphalt, was responsible to do so. Bob's Asphalt did not fill the trench until weeks later. In between the time that Westveld constructed the new concrete slab and when Bob's Asphalt filled in the trench, Plaintiff—a 75-year-old tenant and former employee of Red Oak—tripped on the open trench area as she was taking out the trash, fracturing her ankle. *Id.*, slip op. 4-5.

Plaintiff filed suit asserting a statutory claim under MCL 554.139(1)(a) against Red Oak for failure to keep the common area fit for the use intended, and negligence as to Westveld and Bob's Asphalt for failing to correct the trench and provide adequate warnings of the tripping hazard. *Id.*, slip op. 5. The trial court granted summary disposition—in the pre-*Kandil* era—to the Defendants finding that: (1) Red Oak had not breached its statutory covenant under § 554.139(1)(a) as the dumpster area was “reasonably accessible and therefore fit for the use intended[,]” and (2) that Westveld did not owe Plaintiff a duty because the trench was open and obvious. *Bowerman*, slip op. 5-6. In a split decision, the Court of Appeals affirmed, reasoning that because residents had “retained reasonable access” to the dumpster area, despite the trench, the area was still “fit for the use intended.” *Id.*, slip op. 6. The majority also determined that Plaintiff's claim against Westveld sounded in ordinary negligence, rather than premises liability, but affirmed

### Secret Wardle Notes

Since 2023 when the Supreme Court issued its monumental decision in *Kandil-Elsayed v F & E Oil, Inc*, where the open and obvious element of a defective condition was moved from a question of duty to that of breach, the Court has continued to shake up decades' long case law governing premises liability claims. The July 20, 2026, opinion in *Bowerman v Red Oak Mgmt Co, Inc*, is yet another transformative decision. This time, taking aim at two things: first, clarifying when a claim arising from a condition on land sounds in ordinary negligence versus premises liability; and second, limiting the “mere inconvenience” standard from *Allison v AEW Capital Mgt, LLP* in statutory claims under MCL 544.139(1)(a), holding now that “mere inconvenience” itself is insufficient to defeat characterizations that common areas are *generally* fit for their intended purposes. Now, “mere inconvenience” is but a mere consideration when determining fitness, but not wholly dispositive.

dismissal because Westveld did not breach its duty because the new concrete slab and trench were “visible even in darkness” and because Plaintiff choose to traverse across the trench as opposed to avoiding it. *Id.*, slip op. 6-7. In a dissenting opinion, Judge Mariani would have reversed the trial court believing Westveld had a duty to avoid creating unreasonable risks of harm in the performance of their duties, and that a question of fact existed as to whether Red Oak breached its statutory covenant under § 554.139(1)(a).

The Supreme Court granted oral argument on Plaintiff’s Application to address “whether: (1) defendant Westveld Services, LLC, breached a duty that it owed to the plaintiff; and (2) defendant Red Oak Management Co., Inc., violated MCL 554.139(1)(a).” *Bowerman v Red Oak Mgt Co, Inc*, 21 NW3d 186 (Mich, 2025).

As to Plaintiff’s claim against Westveld—ordinary negligence versus premises liability—the Supreme Court agreed with the Court of Appeals that Plaintiff’s claims sounded in ordinary negligence. *Bowerman*, slip op. 9. The Court took this opportunity to clarify when a claim arising from a condition on land sounds in ordinary negligence versus premises liability. First, pointing out that premises liability claims are predicated upon a “condition of the land” where the defendant has “possession and control” of that land. *Id.*, citing *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 624-26 (2021) and *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660 (1998). Conversely, ordinary negligence is “based on the underlying premise that a person *has the duty to conform [their] conduct to an applicable standard of care when undertaking an activity.*” *Id.*, citing *Jeffrey-Moise, supra*.

On these distinctions, the Supreme Court determined that Plaintiff’s claim against Westveld was based upon their alleged “failure ... to conform their conduct to the applicable standard of care associated with replacing the concrete platform underneath the dumpster.” *Bowerman*, slip op. 9. Looking to the Complaint, the Court also held that Plaintiff did “more than merely alleged that Westveld created a condition on the land[,]” as she went so far as to allege that Westveld breached their duty not to “unreasonably endanger the person or property of others.” *Id.*, slip op. 10, at n 4. In reversing the lower courts’ decisions, the Supreme Court also found certain facts to be critical, such as: Westveld having created the trench when it replaced the concrete slab underneath the dumpster, that Westveld left the site leaving the trench uncovered and unmarked, while at the same time, having covered a smaller trench elsewhere in the community with sand. *Id.*, slip op. 11. On these facts, the Court determined genuine issues of material fact existed as to whether Westveld breached its common-law duty to refrain from unreasonably endangering others. *Id.*

Turning to Plaintiff’s statutory claim under § 554.139(1)(a) against Red Oak, the Supreme Court also reversed. Briefly, MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor—i.e., the landlord—covenants that the premises and all common areas are fit for the use intended by the parties. The statute must be liberally construed in favor of lessees under MCL 554.139(3). The Supreme Court turned to its 2008 decision in *Allison v AEW Cp Mgt*—a parking lot and snow and ice case—where the Court established that parking lots and other areas of which the lessor retains control, constitute common areas under the statute, and that the fitness standard requires the area to be adapted or suited for its intended use—not maintained in an ideal or maximally accessible condition. *Allison*, 481 Mich at 429-430. *Allison* also introduced the concept that “*mere inconvenience of access*”—in the context of removing snow and ice from parking lots—does not defeat the characterization of a common area as fit for its intended purpose. *Id.*, at 430.

In *Bowerman*, the Court examined post-*Allison* decisions finding that courts had improperly “shifted focus from ‘fit[ness] for the use intended...’ [...] to the *degree of unfitness*” making *Allison*’s “mere inconvenience” ruling a “trapdoor” in a proper analysis. *Bowerman*, slip op. 17. The Supreme Court then announced a limit to *Allison* and the “mere inconvenience” inquiry, holding that “the value of [mere inconvenience of access] is limited, especially in this context, where it relates to residences that specifically house elderly or disabled tenants.” *Id.* The proper use of the “mere inconvenience” inquiry, now, “may be relevant, but it is not dispositive.” *Id.*, slip op. 17-18. Under this new analytical framework, the Supreme Court explained the proper inquiry as follows:

Consistent with our explanation in *Allison*, the appropriate inquiry under MCL 554.139(1)(a) remains whether the common area in question is *fit* (i.e., adapted, suited, or appropriate) for the use intended by the parties. See *id.*; MCL 554.139(1)(a). If a common area is fit for such use, a plaintiff may not prevail simply by identifying some inconvenience of access they encountered. Likewise, if a common area is unfit for such use, a defendant may not prevail simply by labeling a hazardous condition as a mere inconvenience. Regardless, the starting point must always be the test set forth in the statute and applied in *Allison*: whether the common area was “fit for the use intended by the parties” under the circumstances of the specific case. MCL 554.139(1)(a); *Allison*, 481 Mich at 429-430. [*Bowerman*, slip op. 18.]

Despite disagreeing with the dissent (Justices Bolden and Zhara) that the decision overruled *Allison*, the Court’s clarification of the proper analysis of statutory claims under MCL 554.139(1)(a), not only limited *Allison*, but introduced a new tenant-population-purpose nexus into the inquiry. The Court relied heavily on the fact that Stanton Park Apartments specifically housed elderly and disabled tenants, so the fitness inquiry must be conducted not in the abstract, but in light of the uses *intended* by the particular tenants within the community. According to the Court, Red Oaks was duty-bound to ensure elderly and disabled tenants had *reasonable* access to the garbage receptacles located in the parking lot areas so as to avoid an unreasonable risk. The trench at issue in this case, while navigable by an able-bodied person, could indeed render that area *unfit* for an elderly or disabled resident.

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