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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Higher Duty for Landlords: Naturally Accumulated Snow and Ice Falls Under Statutory Duty

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In *Benton v Dart Properties Incorporated*, ____ Mich App ____ (Mar. 28, 2006), the Court of Appeals held that the open and obvious defense could not be utilized by a landlord to bar a tenant's claim based on a violation of the statutory duty to maintain the interior sidewalks in a condition fit for the use intended.

In *Benton*, Plaintiff slipped and fell on an ice-covered sidewalk at his apartment complex while walking from his apartment to his car at about 6:15 a.m. Plaintiff testified that he was walking carefully to avoid any icy spots. He successfully negotiated his way through the parking lot on his way to his car in the morning and later that same evening when he returned from work.

Plaintiff left his apartment later that evening, but he was going to use a different vehicle this time. Therefore, Plaintiff took a different path than he had used earlier that day. Plaintiff testified that he walked cautiously along a dimly lit sidewalk inside the apartment complex, until his legs "shot" to his right causing him to fall on his left leg and ankle. While lying on the sidewalk, Plaintiff testified that he was sitting on a patch of ice that he estimated to be four to five feet long. Plaintiff suffered a fractured leg, ongoing pain, disabilities, medical expenses and wage loss because of this fall.

Plaintiff filed a two-count complaint alleging that the apartment complex's failure to remove ice and snow from the sidewalk constituted general negligence and a violation of MCL 554.139 for failing to maintain the common areas in a manner fit for the use intended. The apartment complex filed a motion for summary disposition based on the open and obvious doctrine. Plaintiff argued that the open and obvious doctrine did not apply because the apartment complex violated a statutory duty. The trial court agreed with the apartment complex and granted the motion for summary disposition.

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On its face, the *Benton* opinion appears to conflict with *Teufel v Watkins*, 267 Mich App 425 (2005), which was also a slip and fall in a parking lot. In *Teufel*, the Court stated in a footnote that the "reasonable repair" language of MCL 554.139(1)(b) requires repair of a defect, and natural accumulation of snow and ice is not a defect. *Id.* at 429, n. 1. However, *Teufel* was addressing subsection (1)(b) of MCL 554.139, which requires a landlord to keep the premises in reasonable repair. MCL 554.139(1)(a) only applies to the premises, i.e. the actual residence of the tenant, versus subsection (b) which applies to both the premises and the common areas. Since a parking lot would necessarily be a common area, not a residential area, the *Teufel* Court should have been interpreting MCL 554.139(1)(a) versus MCL 554.139(1)(b). Therefore, reliance on *Teufel* in support of the open and obvious danger defense may not be successful in future cases. Moreover, a handful of unpublished opinions have held that MCL 554.193(1)(a) does not apply to common areas by its own language.

Based on *Benton*, landlords are held to a higher duty of care when it comes to removal of snow and ice from common areas. Moreover, because the duty is a statutory one, landlords can no longer rely on the open and obvious danger doctrine to avoid that duty.

It is anticipated that the Michigan Supreme Court will clarify these issues in the next year.

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The Court of Appeals reversed and remanded. The specific issue addressed by the Court was whether MCL 554.139 imposed an affirmative statutory duty on the apartment complex to maintain its interior sidewalks in a condition fit for the use intended such that the open and obvious doctrine could not be used to circumvent that duty. The Court of Appeals held that "the open and obvious doctrine cannot bar a claim against a landlord for violation of the statutory duty to maintain the interior sidewalks in a condition fit for the use intended under MCL 554.139."

MCL 554.139 requires a landlord keep the premises and all common areas fit for the use intended by the parties. The Court found that the sidewalk on which Plaintiff was walking was a common area. The Court then found that MCL 554.139 refers to common areas separately from premises, making a clear distinction between the two. The Court further stated that neither *O'Donnell v Garasic*, 259 Mich App 569 (2003) nor MCL 554.139 excludes outdoor spaces as common areas. Therefore, the Court concluded that the apartment complex has a duty to "take reasonable measures to ensure that the sidewalks are fit for their intended use." This duty is owed regardless of the openness or obviousness of the condition. Because the intended use of sidewalks is to walk on them, the Court held that a sidewalk covered with ice is not fit for the use intended.

In a footnote, the Court noted that MCL 554.139 and the *O'Donnell* opinion distinguish landlords from general invitors who, pursuant to *Mann v Shusteric Enterprises, Inc.*, 470 Mich 321 (2004), have no duty to remove snow and ice unless the accumulation creates an unreasonable risk of danger. The Court stated that MCL 554.139 and *O'Donnell* "impose a higher duty on landlords than on invitors given the enhanced rights afforded tenants as compared to invitees and the tenant's reliance on interior sidewalks to access their homes and parking structures."

The Court then went on to address whether Plaintiff established a genuine issue of fact regarding whether the apartment complex breached its duty to maintain the common areas in a manner fit for the use intended. The Court held that a question of fact for the jury existed. "Reasonable minds might differ regarding whether defendant's preventative measures, which consisted of salting the sidewalks only once in the morning on the day that plaintiff slipped and fell, constituted reasonable care in light of the weather conditions that day."

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