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Driveway Treated like Sidewalk for Purposes of Landlord-Tenant Act; Icy Condition Renders it Unfit for Intended use, Court of Appeals Holds

By: Sidney A. Klingler **November 4, 2016**

In the unpublished decision of *Hendrix v Lautrec, Ltd.*, unpublished per curiam decision of the Michigan Court of Appeals issued October 27, 2016 (Docket No. 328191), a panel of the Court of Appeals recently considered a landlord's potential liability for an icy condition of a driveway on the landlord's premises allegedly resulting from downspout runoff. Plaintiff brought a claim of premises liability as well as a claim under the Landlord-Tenant Act for failure to keep a common area fit for the use intended by the parties. The trial court granted summary disposition for Defendant landlord with respect to both claims.

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This case is the first in Michigan jurisprudence to hold that a driveway should be treated like a sidewalk for purposes of the Landlord Tenant Act, MCL 554.139. This is an issue of jurisprudential significance which may well attract the attention of the Michigan Supreme Court in the likely event that Defendant landlord should seek leave to appeal from the Court of Appeals' decision.

In an opinion signed by two of the judges on the panel, the Court of Appeals, considering the statutory claim for failure to keep the premises and all common areas fit for the use intended by the parties as required by MCL 554.139(1)(a), took note of the Supreme Court's decision in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), holding that the primary use of a parking lot is to park cars and "[t]he statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot." Notably, the Supreme Court in *Allison* held as a matter of law that a parking lot covered in snow which concealed ice was not unfit for its intended use. But, the *Hendrix* majority reasoned, a driveway is not a parking lot. The majority noted that the driveways on the premises in question were used for pedestrian access to the garages and residential units. In these senses, the majority held, "the driveways are more akin to sidewalks." Sidewalks, the Court noted, "are intended for the use of pedestrians." Where a substantial portion of the driveway abutting the Plaintiff's driveway was covered in ice, the majority held that "[t]his ice created a dangerous condition making the driveway unfit for pedestrian use." The appellate panel thus reversed the dismissal of Plaintiff's statutory claim and remanded for continued proceedings.

With respect to the premises liability claim, the panel affirmed the trial court's order of summary disposition for Defendant landowner. The panel found that the icy patch on the driveway was open and obvious, noting photographs which depicted a damp and icy surface, wintry conditions such as snow on the ground and freezing temperatures, and Plaintiff's lengthy residence at the apartment which should have alerted her to the downspout and the path of its runoff. The panel further found that the icy condition had no special aspects that would except it from the operation of the open and obvious doctrine, as it was neither unavoidable nor so extreme as to create an unusual or inordinate risk of severe harm.

Judge O'Brien in a separate opinion agreed that the hazard was open and obvious, but dissented from the majority's treatment of the driveway as similar to a sidewalk. She opined that *Allison* should control. Judge O'Brien reasoned that while a driveway may be intended for pedestrian access to garages or residential units, the same is true of a parking lot. Judge O'Brien would affirm the decision of the trial court.

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