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The Road Less Traveled: Court of Appeals Reaffirms Landlord-Tenant Act Is Not A Shortcut Around Open and Obvious Doctrine

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). *Lugo* states that a property owner has a duty to protect invitees from "an unreasonable risk of harm caused by a dangerous condition on the land" but, the duty *does not* "encompass removal of open and obvious dangers." *Id.* Open and obvious dangers are those which an average person with ordinary intelligence could reasonably be expected to discover upon casual inspection. Although some form of this defense had existed under Michigan law for decades, *Lugo* made the open and obviousness of a hazard determinative of the defendant's duty – an issue of law decided by a judge – whereas it had previously related to the plaintiff's contributory or comparative negligence – something typically argued before a jury. *Lugo* thereby expanded the class of trip and fall cases that may be dismissed via motion.

In residential tenant claims, plaintiffs frequently try to avoid the open and obvious defense by arguing that the defendant owed a statutory duty, often 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 limitation of § 139(1) in *Flecther v Knollwood Village Associates,* released June 19, 2012, Case No. 304368. *Flecther* was a premises liability suit against an apartment complex that was successfully defended in both the trial court and on appeal by Secrest Wardle.

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.

Plaintiffs' attorneys have increasingly sought to utilize MCL 554.139(1) as a pleading device to avoid the Open and Obvious Doctrine. *Fletcher* underscores that § 139(1) does not necessarily save claims that are otherwise barred by the open and obvious defense.

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." In *Allison, supra* at 429-430 the Supreme Court 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.

In *Fletcher*, Plaintiff fractured her ankle when she unsuccessfully attempted to pivot while her right foot was in a depression in a sidewalk. The sidewalk was located within Defendant's apartment complex, in which Plaintiff lived. Photographs of the sidewalk showed a dirt-covered depression, approximately half the width of the sidewalk at the base of a step. Plaintiff testified that this alleged hazard was avoidable if one used the other side of the sidewalk and step. Plaintiff sued her landlord under a common law premises liability theory. Perhaps anticipating the open and obvious defense, Plaintiff also claimed that her landlord had violated "its statutory duties to maintain the premises and all common areas in a condition fit for their intended use and to keep the premises in reasonable repair" under MCL 554.139(1)(a) and (b).

The trial court granted Defendant's motion for summary disposition, finding that the common law premises liability theory failed because the sidewalk depression was open and obvious, and did not present any special aspects (Plaintiff did not appeal from that holding). The trial court also dismissed the statutory claim, holding as a matter of law that the sidewalk depression was not a serious enough problem to render the sidewalk unfit for its intended purpose.

Plaintiff appealed from the dismissal of her Landlord-Tenant Act claim only. The Court of Appeals affirmed the dismissal, highlighting the limited reach of the statute as follows:

> The lessor's duty to repair as set forth in MCL 554.139(1)(b) does not extend to common areas [per *Allison*, *supra* at 432-433]. Here, the allegedly defective condition involves a sidewalk. A sidewalk is a common area. … Therefore, the statutory duty in MCL 554.139(1)(b) is inapplicable.
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> MCL 554.139(1)(a) applies to common areas, but it "does not require a lessor to maintain [the area] in an ideal condition or in the most accessible condition possible[.]" [*Allison*, *supra* at 430]. When reviewing a trial court's summary-disposition decision concerning a claim based on this statutory duty, this Court must ascertain whether there could be reasonable differences of opinion regarding whether the [sidewalk] was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall. … [T]he intended use of a sidewalk is walking on it…. The submitted photographs of the sidewalk show a dirt-covered depression, approximately half the width of the sidewalk, at the base of a step. Plaintiff's testimony indicates that the alleged hazard was avoidable if one used the other side of the sidewalk and step. Although the sidewalk was not in perfect condition, reasonable minds could not disagree that it was fit for the use intended by the parties….

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