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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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A Very Bad Day for Landlords: *Allison* Decision Re-Issued in Favor of Tenant, Contrary Precedent Explained Away

By Mark Masters

In *Allison v. AEW Capital Management*, _ Mich App _ (2007), the Court of Appeals reversed itself, and re-decided the case in favor of a tenant in a slip and fall case against his landlord.

Plaintiff was a tenant of an apartment building. He slipped and fell on an accumulation of snow and ice as he attempted to reach his car in the parking lot. Plaintiff brought this action against Defendant, AEW Capital Management (AEW), alleging, among other things, that AEW had breached its common law duty to protect and warn plaintiff and its statutory duty as a landlord under MCL 554.139(1). AEW moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that Plaintiff's common law claims were barred because the danger was open and obvious. It further argued that Plaintiff could not rely on MCL 554.139(1) because the statute did not apply to natural accumulations of snow and ice. The trial court granted AEW's motion.

MCL 554.139 provides, in relevant part, as follows:

> (1) In every lease or license of residential premises, the lessor or licensor convenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) 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 of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused the tenants [sic] willful or irresponsible conduct or lack of conduct. ...
>
> (3) The provisions of this section shall be liberally construed...

SECREST WARDLE NOTES:

Under MCLA 554.139, the Court of Appeals has now held that landlords have "a duty to keep the parking lot free from ice." Not "reasonably free from ice," but "free from ice." This decision has, in effect, created strict liability in snow and ice cases brought by tenants against their landlords. The only saving grace for landlords may be Michigan's modified comparative negligence standards (*e.g.*, a person who is more than 50% at fault cannot recover non-economic damages, and if that comparative negligence is due to intoxication, that person can recover nothing), which are also statutory in nature.

It is anticipated that the Michigan Supreme Court will review this case, but that process could take more than a year and the outcome is unknown.

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In *Teufel v Watkins*, 267 Mich App 425 (2005), the Court of Appeals decided a case involving a tenant who slipped and fell on ice in his landlord's parking lot. The *Teufel* Court concluded that "reasonable repair" as used in MCL 554.139(1)(b) required repair of a defect in the premises and that the accumulation of snow and ice was not a defect in the premises. The *Teufel* Court then held, in a footnote and without any analysis, its conclusions regarding MCL 554.139(1)(b) were also applicable to MCL 554.139(1)(a).

The *Allison* Court held that *Teufel* was "legally flawed" for two reasons. First, *Teufel* failed to mention *O'Donnell v Garasic,* 259 Mich App 569 (2003), which held that the open and obvious danger doctrine was not available to deny liability when the defendant had a statutory duty to maintain the premises in reasonable repair. Second, that *Teufel's* holding was in a footnote. However, it was the footnote reason alone which gave the *Allison* Court the authority to ignore *Teufel*. "Despite our disagreement with the legal analysis in *Teufel*, we would be bound to follow it under MCR 7.215(J)(1) were it not for one fact. In *Teufel*, this Court's discussion of MCL 554.139(1)(a) and (b) appeared in a footnote to the opinion rather than in the body of the opinion. It is generally ill advised for an opinion to render a holding in a footnote. Had our Court in *Teufel* intended to create a rule of law regarding the availability of the open and obvious danger doctrine when a landlord has a statutory duty under MCL 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote."

The *Allision* Court went on: "We hold that this Court's decision in *Benton [v Dart Properties Inc,* 270 Mich App 437; (2006)] is controlling in this case. In order to determine whether defendants can rely on the open and obvious danger doctrine to avoid liability, we must determine whether a parking lot is a common area under MCL 554.139(1)(a), which would trigger defendants' duty to keep the parking lot fit for the use intended by the parties. *Benton, supra. Teufel* did not analyze whether a parking lot is a common area under MCL 554.139(1)(a) and therefore did not determine whether a landlord had a duty to keep it fit for the use intended, but *Benton* did analyze whether a sidewalk was a common area under the statute. Like the Court in *Benton*, we conclude that the parking lot in the instant case was a common area under MCL 554.139(1)(a). The parking lot, like the sidewalk in *Benton*, is located within the parameters of the apartment complex and must be maintained by the landlord or someone in the landlord's employ. In addition, tenants also must necessarily walk on the parking lot to access their vehicles from their apartments and to access their apartments from their vehicles. The intended use of a parking lot is to park cars and other motor vehicles; however, in order to access their vehicles and apartments, tenants must also necessarily walk on the parking lot. A second intended use of a parking lot, therefore, is walking on it. A parking lot covered with ice is not fit for this purpose. See *Benton, supra*. In extending the holding of *Benton* to a parking lot, we are mindful that the provisions of MCL 554.139 'shall be liberally construed[.]' MCL 554.139(3). We therefore conclude that a parking lot, like a sidewalk, constitutes a common area under MCL 554.139(1)(a) and that defendant had a duty to keep the parking lot free from ice."

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We welcome your questions and comments.

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