

STATE OF MICHIGAN  
COURT OF APPEALS

---

LLOYD CASH,

Plaintiff-Appellee,

v

WOODWARD AVENUE ASSOCIATES, L.L.C.,

Defendant-Appellant.

---

UNPUBLISHED

January 15, 2013

No. 305892

Wayne Circuit Court

LC No. 10-004664-NO

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by leave granted the order granting in part and denying in part summary disposition to defendant in this premises liability action. We affirm in part and reverse in part.

Defendant argues that the trial court erred by denying in part its motion for summary disposition because there was no question of material fact with respect to defendant's statutory duty to plaintiff, and because plaintiff's common law claim was barred by the "open and obvious" defense. We agree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). "This Court reviews de novo a trial court's ruling on a motion for summary disposition," *Anzaldúa v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011), and, in doing so, "considers only the evidence that was properly presented to the trial court in deciding the motion," *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012). "Although we view substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion, the nonmoving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his or her case." *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 128; 782 NW2d 800 (2010).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is proper if there is no genuine issue of material fact and the moving party

is entitled to judgment as a matter of law.” *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). “This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Auto Club Group Ins Ass’n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011).

“[W]hether a duty exists in a tort action is generally a question of law to be decided by the court, and when a court determines that a duty was not owed, no jury-submissible question exists. Because the issue of the openness and obviousness of a hazard is an ‘integral part’ of the question of *duty*, establishing whether a duty exists in light of the open and obvious nature of a hazard is an issue within the province of the court.” *Hoffner v Lanctoe*, 492 Mich 450, 476; 821 NW2d 88 (2012) (footnotes omitted; emphasis in original).

“(1) In every lease or license of residential premises, the lessor or licensor covenants: (a) [t]hat the premises and all common areas are fit for the use intended by the parties[, and] (b) [t]o 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 by the tenants wilful or irresponsible conduct or lack of conduct.” MCL 554.139(1)(a)-(b). “The covenants created by the statute establish duties of a lessor or licensor of residential property to the lessee or licensee of the residential property, most typically of a landlord to a tenant.” *Mullen v Zerfas*, 480 Mich 989, 989-990; 742 NW2d 114 (2007).<sup>1</sup> “MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law.” *Hadden*, 287 Mich App at 128 (emphasis in original).

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.” *Hadden*, 287 Mich App at 130. MCL 554.139(1)(a) “does not require perfect maintenance” of common areas, nor does it require that common areas “be in an ideal condition, nor in the most accessible condition possible.” *Id.* Outdoor sidewalks on the grounds of apartment complexes are “common areas” for purposes of MCL 554.139; “[t]herefore, a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use,” which is walking on them. *Benton v Dart Props, Inc*, 270 Mich App 437, 442-444; 715 NW2d 335 (2006).

“[T]he lessor’s duty to repair under MCL 554.139(1)(b) does not apply to common areas and, therefore, does not apply to [sidewalks].” *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 435; 751 NW2d 8 (2008). Because plaintiff’s accident occurred on a sidewalk, plaintiff has not stated a valid claim under MCL 554.139(1)(b), and the analysis will proceed under MCL 554.139(1)(a).

---

<sup>1</sup> Although this is only an order of the Supreme Court, such orders constitute binding precedent when the rationale can be understood. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002).

The Supreme Court held in *Allison* that “one to two inches of snow” on a parking lot could not create “reasonable differences of opinion” that the parking lot was nevertheless suitable for both its primary purpose, parking cars on it, and its secondary purpose, walking to and from vehicles. *Allison*, 481 Mich at 430. Still, “a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, [but] it would be triggered only under much more exigent circumstances. . . . Mere inconvenience of access . . . will not defeat the characterization of a lot as being fit for its intended purposes.” *Id.*

In *Benton*, this Court held that “a sidewalk covered with ice is not fit for” its intended purpose, and for that reason the trial court erred in granting summary disposition. *Benton*, 270 Mich App at 444-445. The Court stressed that the “defendant owed [the] plaintiff a duty of reasonable care regardless of the openness or obviousness of the icy sidewalk conditions.” *Id.*

The plaintiff in *Hadden* slipped on a stairway covered in black ice, and in affirming the trial court’s denial of the defendant’s motion for summary disposition, this Court found that “black ice on a stairway presents more than the ‘mere inconvenience’ posed by one to two inches of snow in a parking lot,” referring to the facts of *Allison*. *Hadden*, 287 Mich App at 132.

Applying the above stated principles to the present case, the dispositive question is whether the sidewalk differential was more than a “[m]ere inconvenience,” *Allison*, 481 Mich at 430. The sidewalk at issue did not contain cracks throughout, but rather there was a differential of approximately two inches on one side between two slabs of the sidewalk. Given that MCL 554.139(1)(a) “does not require perfect maintenance” of common areas, nor that common areas “be in an ideal condition, nor in the most accessible condition possible,” *Hadden*, 287 Mich App at 130, the slightly imperfect sidewalk does not constitute a breach of MCL 554.139(1)(a). Therefore, defendant did not breach its statutory duty to plaintiff, and the trial court erred by denying summary disposition on this basis.

A common law premises liability action is based on the general rule that “an owner of land ‘owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.’ Absent special aspects, this duty does not extend to open and obvious dangers.” *Buhalis v Trinity Continuing Care Services*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket Nos. 296535, 300163, issued May 29, 2012), slip op at 3 (internal citation omitted). “[A] defendant cannot use the ‘open and obvious’ danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises in accordance with MCL 554.139(1)(a) or (b).” *Allison*, 481 Mich at 425 n 2.

“The possessor of land ‘owes no duty to protect or warn’ of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This is an *objective standard*, calling for an examination of ‘the objective nature of the condition of the premises at issue.’” *Hoffner*, 492 Mich at 460-461 (footnotes omitted; emphasis in original).

“[S]teps and differing floor levels [are] not ordinarily actionable *unless* unique circumstances surrounding the area in issue [make] the situation unreasonably dangerous. . . . [A] reasonably prudent person will look where he is going, will observe the steps, and will take

appropriate care for his own safety.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614, 616; 537 NW2d 185 (1995) (emphasis in original).

The plaintiff in *Novotney v Burger King Corp*, 198 Mich App 470; 499 NW2d 379 (1993), fell when she stepped from a sidewalk onto a handicapped access ramp. *Id.* at 472. This Court affirmed the trial court’s order granting the defendant’s motion for summary disposition, holding that there was “no indication from the record that the ramp was not in plain view or that, upon casual inspection, an ordinary user could not ascertain the nature of the incline and use the ramp with safety,” and that it therefore was “reasonable to expect that [an] invitee would discover the danger.” *Id.* at 475-476.

The evidence in the lower court record leaves no question of material fact that the differential between the two concrete slabs that caused plaintiff’s fall was open and obvious. Accordingly, the trial court should have granted defendant’s motion for summary disposition in its entirety. Plaintiff’s brief relied on the statutory duty and failed to argue that the condition of the sidewalk was not open and obvious. Pictures of the sidewalk taken by plaintiff establish that the height differential was in “plain view,” and an “ordinary user could . . . ascertain the nature of” the sidewalk and step over or around it, as most people, including plaintiff had done. *Novotney*, 198 Mich App at 475-476. There was no evidence that the differential was hidden or difficult to see; to the contrary, all of the deposed witnesses were familiar with the two concrete slabs in question. Because no question of material fact was created by the evidence in the lower court record, the trial court erred by failing to grant defendant’s motion for summary disposition under MCR 2.116(C)(10) in its entirety.

Affirmed in part and reversed in part. We do not retain jurisdiction. Defendant, the prevailing party, may tax costs, MCR 7.219.

/s/ Pat M. Donofrio  
/s/ Karen M. Fort Hood  
/s/ Deborah A. Servitto