STATE OF MICHIGAN

COURT OF APPEALS

VERNA HOFFMAN,

Plaintiff-Appellant,

v

RED OAK MANAGEMENT CO., INC., and EDMORE PINES APARTMENTS,

Defendants-Appellees,

and

CURRENT LAWN CARE, LLC,

Defendant.

UNPUBLISHED
September 17, 2020

No. 349832
Montcalm Circuit Court
LC No. 2018-023627-NO

Before: REDFORD, P.J., BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this premises liability action, plaintiff, Verna Hoffman, appeals as of right the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendants, Red Oak Management Co., Inc. (Red Oak), and Edmore Pines Apartments (Edmore Pines). Because we conclude that plaintiff established the existence of a genuine issue of material fact, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff sustained injuries on January 16, 2017, at approximately 6:00 p.m., when she slipped and fell on an icy walkway outside of her apartment at Edmore Pines which is managed by Red Oak. The night before, the area had freezing rain. Edmore Pines' maintenance man, Adam Teed, testified that he salted the walkways during the morning of January 16, 2017. Plaintiff's neighbor and friend, Nancy Bell, testified that she used the walkway early in the day without incident. Plaintiff's son, Ian Chepko, testified that he went outside of the apartment around 3:00 p.m. to smoke a cigarette, and although it seemed very cold and windy, the weather looked fine.

The day's weather, however, featured temperatures that ranged from above freezing to well below freezing with intermittent precipitation and freezing rain that started around 3:00 or 4:00 p.m.

Plaintiff sued each defendant for negligence and violation of their statutory duties owed to tenants under MCL 554.139. Plaintiff later amended her complaint to add a negligence claim against defendant Current Lawn Care, LLC, which provided snow removal and salting at Edmore Pines in the winter. Edmore Pines and Red Oak moved for summary disposition under MCR 2.116(C)(10), arguing in part that the walkway was fit for its intended use as required under MCL 554.139(1)(a), and even if it was not, that the icy condition was open and obvious and they were not on notice of the walkway's icy condition as required for any liability to attach. The trial court granted defendants' motion.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim, and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court considers the evidence that was properly presented to the trial court in deciding the motion. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). As explained in *Peña*,

> The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material facts exists. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. [*Id*. (quotation marks and citations omitted).]

III. ANALYSIS

Plaintiff first argues that the trial court erred when it determined that the walkway was fit for its intended use under MCL 554.139(1)(a). We agree.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Generally, landowners owe a duty of reasonable care to licensees and invitees who enter upon their land. *Lugo v Ameritech Corp,*

Inc, 464 Mich 512, 516; 629 NW2d 384 (2001). In addition to the general common-law duties that a landowner owes to invitees, MCL 554.139[1] imposes further covenants and duties on landlords who lease or license their property to residential tenants.

In *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289; 933 NW2d 732 (2019), this Court summarized the three-pronged analytical framework for determining liability under MCL 554.139(1)(a) addressed by our Supreme Court in *Allison*, 481 Mich at 430:

> First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there could be "reasonable differences of opinion regarding" whether the conditions made the common area unfit for its intended use.

In this case, the parties agree that the first two prongs are met and do not dispute that plaintiff, as a tenant, held invitee status for premises liability purposes. The parties, however, disagree whether ice rendered the walkway unfit for its intended use.

In *Benton*, 270 Mich App at 444-445, this Court considered an icy sidewalk that constituted a common area that had apparently been salted on the day of the plaintiff's slip and fall. In its motion for summary disposition, the defendant presented evidence of its snow and ice removal procedures "including salting, ongoing spot checks, and monitoring of the weather" and how it had salted the sidewalk on the morning of the plaintiff's accident. *Id*. at 444. This Court concluded that sidewalks are common areas for which MCL 554.139(1)(a) imposed upon landlords a duty to take reasonable steps to ensure that they are fit for their intended uses such as walking on them. *Id*. Despite the evidence of the landlord's ice removal on the day of the accident, this Court concluded that the plaintiff established a genuine issue of material fact regarding whether the defendant breached its statutory duty to maintain the sidewalk in a manner fit for its intended use because "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." *Id*. at 444-445.

In *Allison*, 481 Mich at 430, our Supreme Court ruled that a common area (a parking lot), although covered in one to two inches of snow when a plaintiff slipped and fell, remained fit for its intended use. Our Supreme Court reasoned:

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[1] MCL 554.139 provides, in pertinent part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> * * *
>
> (3) The provisions of this section shall be liberally construed . . . .

> The 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. Mere inconvenience of access . . . will not defeat the characterization of a lot as being fit for its intended purposes. [*Id*. at 430.]

Although the *Allison* Court referred to snow in a parking lot as a "[m]ere inconvenience of access" that did not render a common area unfit for its intended use, this Court recently applied the three-pronged analysis and concluded that a sidewalk covered in ice is not fit for its intended use. In *Estate of Trueblood*, 327 Mich App at 290-291, this Court determined that a question of fact existed whether the sidewalk was completely covered with ice that made the ice more than a mere inconvenience. De novo review of the evidence led this Court to conclude that "a sidewalk completely covered in ice is not fit for its intended use because it does not present a mere inconvenience of access, anyone walking on a sidewalk completely covered in ice would be forced to walk on ice, and there is no way to simply walk around it." *Id*. at 291 (quotation marks and citations omitted). This Court clarified that "*Allison* does not stand for the notion that evidence of ice cannot make a sidewalk unfit for its intended use" . . . but requires that "a plaintiff must present more evidence than simply the presence of ice or snow and someone falling." *Id*. at 291-292.

In this case, viewing the evidence in the light most favorable to plaintiff, we conclude that a genuine issue of material fact existed as to whether defendants maintained the walkway in a condition fit for its intended use. Plaintiff presented sufficient evidence to allow reasonable differences of opinion regarding whether the walkway "was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall." *Hadden v McDermitt Apartments LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). Teed testified that he salted the walkway the morning of plaintiff's accident because freezing rain fell the night before but he acknowledged that snow would melt off the building's roof and freeze on the walkways. He testified further that on the day of the accident it started raining around 3:00 or 4:00 p.m. Bell testified that she saw no salt on the walkway on the day of plaintiff's fall when she walked on it around 10:00 a.m. and 12:30 p.m. Plaintiff testified at her deposition that she fell after walking just a few yards because of ice on the walkway. Bell and Chepko testified that, just moments after plaintiff fell, they attempted but could not reach plaintiff to aid her because ice covered the walkway making it impassable. They also testified that emergency medical personnel similarly struggled to render aid because of the pervasiveness of the ice on the walkway. Plaintiff submitted an affidavit from an expert meteorologist who opined that the weather data indicated that drizzle and light rain fell the afternoon of the accident and the temperature fell to below freezing which would have caused ice to form on the walkway if not salted. Further, he opined that, if salt had been applied to the walkway, it would have ameliorated the icy condition and the amount of precipitation during the day would not have washed such salt away. He concluded that the existence of ice in the location of plaintiff's fall indicated that Teed had not salted the area or applied an insufficient amount.

In considering defendants' (C)(10) motion, the trial court was required to view all of the evidence in a light most favorable to plaintiff, the nonmoving party, to discern and determine whether reasonable minds would differ on the issue of defendants' maintenance of the walkway's fitness for its intended use. We conclude, based upon the record, that plaintiff established the existence of a genuine issue of material fact as to whether defendants breached their duty under

MCL 554.139(1)(a), and therefore, the trial court erred by granting defendants summary disposition. Reasonable minds could differ regarding whether defendants took reasonable steps to maintain the walkway in a condition fit for tenants' use in light of the weather conditions leading up to plaintiff's fall.

Plaintiff also argues that the trial court erred by ruling that defendants were not on notice of the walkway's icy condition. We agree.

A landowner's duty to protect invitees only extends to hazards that it knows of or would discover in the exercise of reasonable care. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). As our Supreme Court explained:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Id*.]

To establish notice (and therefore, duty), a plaintiff must present sufficient evidence that creates a genuine issue of material fact as to whether the defendant had actual or constructive notice of the dangerous condition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10; 890 NW2d 344 (2016). "[C]onstructive notice arises not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965). Generally, whether a dangerous condition has existed for a sufficient length of time to establish notice is a question of fact. *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

In this case, the record indicates that a question of fact exists whether defendants had actual or constructive notice of the icy condition on the walkway at Edmore Pines. Teed testified that he salted the walkways in the morning on the day plaintiff fell because of freezing rain the night before. Witnesses observed rain on the day of the accident and that the temperature turned cold. Evidence indicated that around 3:00 or 4:00 p.m. freezing rain commenced. As defendants' agent, his knowledge of the potentially hazardous weather conditions may be imputed to defendants. See *New Props, Inc. v Newpower*, 282 Mich App 120, 134; 762 NW2d 178 (2009) (explaining the doctrine of imputed knowledge). The meteorologist explained that drizzle and light rain would have formed ice as the temperature fell between 4:30 and 5:00 p.m. on the date of plaintiff's accident, more than an hour before plaintiff fell. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks*, 477 Mich at 984. We conclude that the record indicates that a genuine issue of material fact exists whether defendants had notice, actual or constructive, regarding the icy condition of the walkway because reasonable minds could conclude based on the facts presented to the trial court that defendants did or could have discovered the icy condition caused by that day's rain and falling temperatures sufficient to place defendants on notice.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Jane M. Beckering
/s/ Michael J. Kelly