

STATE OF MICHIGAN
COURT OF APPEALS

EUNICE DRAKE,

Plaintiff-Appellee,

V

JWG INVESTMENTS, LLC,

Defendant-Appellant.

UNPUBLISHED

August 23, 2005

No. 260786

Wayne Circuit Court

LC No. 04-407602-NO

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition. Plaintiff resided in defendant's apartment building where she slipped and fell on a patch of ice located on a common walkway. Defendant argued below it could not be held liable for plaintiff's injuries because she failed to produce evidence that defendant knew or should have known the icy condition existed and because the ice patch was an avoidable, open and obvious condition. We agree with defendant. We also find no merit in plaintiff's alternative argument for affirming the trial court, i.e., that material issues of fact remain for trial regarding whether defendant breached covenants imposed by MCL 554.139. Accordingly, we reverse and remand to the trial court for entry of judgment for defendant.

We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. The trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id.* at 120-121. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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 might differ." *Id.*

We also review de novo questions of law, including the interpretation and application of a statute, *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 132

(2003), and whether a party has a duty of care giving rise to a tort action for negligence upon its breach, *Benejam v Detroit Tigers, Inc.*, 246 Mich App 645, 648; 635 NW2d 219 (2001).

Because of their landlord-tenant relationship, defendant owed plaintiff a common-law duty of care with respect to the common areas of the apartment complex over which defendant retained control. *Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495, 499; 418 NW2d 381 (1988); *Stanley v Town Square Cooperative*, 203 Mich App 143, 149; 512 NW2d 51 (1993). As to the common areas, a landlord-invitator is subject “to liability for physical harm caused to his [tenants or other] invitees by a condition on the land if the [landlord]: (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 [tenants or other] 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.” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), citing 2 Restatement Torts, 2d, § 343, and *Quinlivan v Great Atlantic & Pacific Tea Co, Inc.*, 395 Mich 244, 258-259; 235 NW2d 732 (1975).

With respect to snowy or icy conditions, the *Quinlivan* Court also held that “[w]hile the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation” and must take “reasonable measures . . . within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.” *Id.* at 261. On the other hand, under the open and obvious doctrine, “where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992).

In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3-4, 8-9; 649 NW2d 392 (2002), this Court concluded that the holding of *Quinlivan* regarding snowy or icy conditions has been subsumed by the open and obvious doctrine as applied in subsequent cases, in particular, *Lugo v Ameritech Corp.*, 464 Mich 512, 516; 629 NW2d 384 (2001). See also, *Kenny v Kaatz Funeral Home Inc.*, 264 Mich App 99, 117-118 (Griffin, J., dissenting); 689 NW2d 737 (2004), rev ___ Mich ___; 697 NW2d 526 (#127472, June 17, 2005)(reversing in lieu of granting leave to appeal for the reasons stated in the dissenting opinion), and *Joyce v Rubin*, 249 Mich App 231, 237; 642 NW2d 360 (2002). *Lugo* held an invitor has a duty to take reasonable precautions to protect invitees from an open and obvious danger only “if special aspects of a condition make even an open and obvious risk unreasonably dangerous.” *Lugo, supra* at 517. “Special aspects” may impose a duty to warn or protect against even an open and obvious condition when evidence creates a genuine issue of material fact whether the condition is “effectively unavoidable,” creating a “uniquely high likelihood of harm,” or when “special aspects” of the condition creates “an unreasonably high risk of severe harm.” *Id.* at 518. “In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Id.* at 519.

So, absent “special aspects,” if the ice patch in the present case was “open and obvious,” that doctrine precludes holding defendant responsible under the theory of premises liability when the “injury would have been avoided had [the] danger been observed.” *Millikin v Walton Manor*,

234 Mich App 490, 497; 595 NW2d 152 (1999). Whether a danger is “open and obvious” depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Joyce, supra* at 238. This is an objective test, asking whether a reasonable person would have appreciated the danger rather than whether the plaintiff should have. *Id.* We also apply an objective analysis to determine whether evidence of “special aspects” exists. Our Supreme Court explained in *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004):

To determine whether a condition is “open and obvious,” or whether there are ‘special aspects’ that render even an “open and obvious” condition “unreasonably dangerous,” the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the “condition of the premises,” not the condition of the plaintiff.

Here, the evidence regarding the patch of ice on the walkway of defendant’s apartment complex indicates that a reasonably prudent person would have appreciated and been able to avoid slipping and falling. Although plaintiff argues that rust stains on the sidewalk and inadequate lighting may have made the ice difficult to see, she produced no evidence that these conditions would likely have prevented a reasonably prudent person from appreciating the danger of the ice on the sidewalk. Rather, plaintiff’s own testimony establishes that a reasonably prudent person would have appreciated the danger and been able to avoid it.

Plaintiff testified in her deposition that while walking on a sidewalk beneath a second-floor walkway, her feet slipped out from under her and she fell.

Q. After you got up, were you able to see this ice?

A. I did see it, I did notice it.

Q. Yeah. Unfortunately, you just didn’t see it before you walked by it.

A. That’s correct.

Q. Were you looking at the parking lot as you were walking?

A. I wasn’t really paying attention. I was more or less, . . . I was more or less just walking, and I didn’t see it.

Q. But afterwards when you did pay attention and look down, you were able to see it?

A. Yeah I was able to see it.

Moreover, plaintiff admitted that regardless of the nature of the rust stains or artificial lighting, she could have seen and avoided the ice patch.

Q. How big a sheet of ice?

A. It wasn't as big as was one of the squares that's connected to the walkway, it wasn't like covering the whole - -

Q. Sidewalk square?

A. Right, it was not covering the whole sidewalk square.

* * *

Q. But a standard city sidewalk square?

A. Right.

Q. Was it half the size of one of those squares?

A. No, it was more or less like off to one of the corners because it wasn't - - it was not completely over the sidewalk, it appeared to be on one part of the sidewalk going towards the other sidewalk to the cars.

Q. O.K. So if I understand it, there would have been room to pass on the sidewalk without encountering it, but the path that you took just happened to take you over that ice, is that correct?

A. Yeah, that would be correct.

We conclude that the trial court erred. Clearly, this evidence established as a matter of law that the condition here was "open and obvious." From plaintiff's own testimony, and giving plaintiff the benefit of the doubt, reasonable minds could only find that a reasonably prudent person upon casual inspection would have appreciated the danger of ice on the sidewalk. *West, supra* at 183; *Kenny, supra* at 119-120 (Griffin, J., dissenting). Likewise, reasonable minds could only find from the evidence plaintiff produced that the danger of the ice patch was avoidable. In other words, plaintiff did not raise a material question of fact that a "special aspect" of "uniquely high likelihood of harm" existed. *Lugo, supra* at 519. Finally, plaintiff failed to produce evidence that the partially ice-covered sidewalk presented a uniquely high likelihood of severe harm. *Id.*; *Kenny, supra* at 121 (Griffin, J., dissenting). See, also, *Corey, supra* at 6-7 (three steps elevated only a couple of feet covered with snow and ice did not present a uniquely high likelihood of severe injury or death), and *Joyce, supra* at 243 (a sidewalk with a light covering of snow and ice was a common condition, not a uniquely dangerous one). Consequently, we conclude the trial court erred by not granting defendant judgment as a matter of law on plaintiff's common-law premises liability theory because reasonable minds could not disagree that the ice on the sidewalk here was an "open and obvious" condition that presented no "special aspects" making it unreasonably dangerous. *Kenny, supra* at 119, 121 (Griffin, J., dissenting); *Lugo, supra* at 519.

Moreover, even if the open and obvious doctrine did not apply, plaintiff failed to produce evidence raising a material issue of fact regarding an essential element of premises liability: that the party against whom a claim is asserted must have had either actual or constructive knowledge of the condition. *Stitt, supra* at 596; 2 Restatement Torts, 2d, § 343. No evidence indicated

defendant knew the ice had formed. While one of defendant's principals was on the premises on the day plaintiff fell, there is no evidence that he ever passed along the same walkway where the ice had formed and, if he had, that the ice was there to be seen. In some circumstances, constructive knowledge of a condition may be inferred if evidence shows that it "was present long enough that the defendant should have known of it." *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). But here, plaintiff produced no evidence that the ice on the sidewalk had existed for any length of time. Plaintiff only points to general weather data and argues a question of fact exists whether defendant should have known ice would develop. The weather data and plaintiff's argument provide a basis for speculation but offer no evidence on when the ice patch at issue formed and "says nothing about defendant's knowledge of the ice." *Altairi v Alhaj*, 235 Mich App 626, 635; 599 NW2d 537 (1999). Thus, regardless of whether the ice on the sidewalk was an open and obvious condition, the evidence failed to show that defendant knew or should have known it existed, or that it presented an unreasonable danger. Therefore, on this independent basis, defendant could not be held liable for plaintiff's injuries under the common law of premises liability.

Plaintiff also argues that this Court should affirm the trial court on the alternative basis that she alleged and material issues of fact existed whether defendant violated MCL 554.139. "The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b)." *O'Donnell v Garasic*, 259 Mich App 569, 579, 581; 676 NW2d 213 (2003). The statute provides in 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.

(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 by the tenants willful or irresponsible conduct or lack of conduct. [MCL 554.139(1).]

Although the parties argued this issue below, the trial court did not address it. But because defendant raised this issue in its application for leave to appeal, and the parties have briefed the merits on appeal, we will address the issue now in the interest of judicial economy. See MCR 7.205(D)(4); *Michigan Nat'l Bank v Michigan Livestock Exch*, 432 Mich 277, 295-296; 439 NW2d 884 (1989).

Defendant argues that plaintiff did not adequately plead a violation of the statute. But in her complaint plaintiff alleged defendant owed and breached common law and statutory duties to her inter alia, by "[f]ailing to maintain a reasonably safe tenant environment as required by common law, local code and state law" and "[f]ailing to maintain and/or repair the roof and/or gutters to prevent the dangerous accumulation of ice and snow." We agree with plaintiff that her

complaint, coupled with her arguments on this issue in the trial court, provided defendant with adequate notice of her factual allegations. MCR 2.111(B)(1). Moreover, plaintiff may amend her complaint at the summary disposition stage if a claim is not adequately stated and otherwise supported by the evidence. MCR 2.116(I)(5); *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

Next, we reject defendant's argument that MCL 554.139 does not create a private cause of action for its violation. See *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002), and *O'Donnell, supra* at 580-583. The common law only required a landlord to disclose latent defects in the demised premises that the landlord knew of or should have known existed at the time the lease was entered into but imposed no duty to make repairs. *Calef v West*, 252 Mich App 443, 450-451; 652 NW2d 496 (2002). Statutes like MCL 554.139 have long been recognized as modifying the common law and creating a tort action for their violation. See *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978), citing *Annis v Britton*, 232 Mich 291; 205 NW 128 (1925), and *Crawford v Palomar*, 7 Mich App 21; 151 NW2d 236 (1967). Still, the implied covenant of MCL 554.139(1)(b) "[t]o keep the premises in reasonable repair during the term of the lease" does not apply on the facts of this case.

Plaintiff leased an apartment on the second floor of defendant's apartment building. She accessed the apartment by ascending an exterior stairway and traversing an exterior walkway. Directly beneath the second floor walkway was an exterior walkway by which first-floor apartment dwellers accessed their apartments. Plaintiff was walking on the first-floor walkway, covered only by the second-floor walkway, at the time she slipped and fell. It is undisputed that the walkway on which plaintiff fell was a part of the common areas of the apartment complex and not part of the premises that plaintiff rented.

"If the language of a statute is clear, no further analysis is necessary or allowed." *Eggleston, supra* at 32. "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). When reading a statute we must ascribe to every word or phrase its plain and ordinary meaning, unless otherwise defined in the statute, and also, "it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory." *Id.* Further, we must not read a word or phrase of a statute in isolation but must allow their placement in the whole statute to provide meaning in context. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). See, also, *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995): "In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'"

Here, the Legislature has plainly treated separately "the premises" and "all common areas." We cannot ignore that the Legislature has clearly differentiated between "premises" and "common areas," and that the former is also further described as "residential premises," clearly a place where a lessee lives. Further, the Legislature has unambiguously applied the covenant to keep in "reasonable repair" only to "the premises," and not the common areas. Because only the condition of common areas is in question, only the covenant of MCL 554.139(1)(a) "[t]hat the premises and *all common areas* are fit for the use intended by the parties" is pertinent on the facts of this case (emphasis added).

Plaintiff asserts that the gutters of the apartment building above the second-floor walkway were defective, allowing water to drip and form ice on the first-floor walkway below. We assume for purposes of analysis that the apartment building's gutters are part of the common areas of the apartment building. But plaintiff offers no evidence whatsoever that either the gutters or the first-floor walkway were unfit for the use they were intended. Plaintiff points to no evidence of a defect in either the gutters or walkway. The testimony of one of defendant's principals that the gutters were replaced in the fall of 2001 or the summer of 2002 because a gap had developed between the gutters and the roof line does not establish the gutters were unfit for the use they were intended when plaintiff fell on December 7, 2002. Likewise, photographs depicting icicles hanging over the outer edge of the gutters in January 2003 do not establish the gutters were defective when plaintiff fell. Indeed, icicles hanging over the edges of gutters or from the edge a roof are common during Michigan winters. Further, even it is assumed that the gutters were defective, and the defect caused the gutters to leak, plaintiff offers nothing more than speculation that leaking gutters caused ice to develop on the sidewalk two stories below. In sum, plaintiff produced no evidence that an alleged defect in the gutters or the walkway was a cause in fact of plaintiff's injuries.

In addition, plaintiff's statutory claim would still fail even if the gutters were defective in the manner plaintiff claimed, and the defect was both cause in fact and a proximate cause of plaintiff's fall. See, e.g., *Haliw v City of Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001). When discussing a similar housing code duty to keep dwellings in good repair, this Court opined "that the landlord was under a duty to repair all defects of which he knew or should have known." *Raatikka, supra* 430. "This does not impose a duty upon the landlord to inspect the premises on a regular basis to determine if any defects exist. It does require him to repair any defects brought to his attention by the tenant or by his casual inspection of the premises." *Id.* at 430-431. Thus, plaintiff's statutory theory fails because she produced no evidence establishing defendant knew or should have known of any defect needing correction.

To summarize, plaintiff failed to produce evidence that either the gutters or the walkway where she fell was unfit for its intended use. Further, plaintiff did not produce any evidence that either the gutters or the walkway was defective. Although plaintiff theorized a defect in the gutters permitted ice to develop on the walkway, she produced no evidence that supported her theory of causation. In addition, because actual or constructive knowledge of a condition needing correction is a requisite element for imposing either common-law or statutory liability, both of her claims fail on this alternative basis.

We reverse and remand for entry of judgment for defendant. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey