STATE OF MICHIGAN

COURT OF APPEALS

RENA FARMER and WILLIAM FARMER, Plaintiffs-Appellants, v PRACTICAL LIMITED DIVIDEND HOUSING ASSOCIATION, PARKVIEW TOWERS & SQUARE, and WALKER LAWN MAINTENANCE AND NORTHERN LANDSCAPE SUPPLY, INC., Defendants-Appellees.	UNPUBLISHED July 21, 2009 No. 280627 Wayne Circuit Court LC No. 06-607226-NO

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiffs, Rena Farmer and William Farmer, appeal as of right one order granting summary disposition in favor of defendants, Practical Limited Dividend Housing Association ("Practical") and Parkview Towers & Square ("Parkview"), a second order granting summary disposition in favor of defendant, Walker Lawn Maintenance and Northern Landscape Supply, Inc. ("Walker"), and a third order granting summary disposition in favor of all three defendants. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs first argue that genuine issues of material fact exist regarding whether defendants Practical and Parkview breached a duty to plaintiff Rena by failing to remove ice from the premises and whether these defendants had notice of the hazardous condition. We agree.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). In presenting their arguments, the parties and the court have gone beyond the pleadings. Therefore, plaintiffs' claims should be reviewed under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The Court considers "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* Moreover, the Court reviews only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm*,

255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham, supra* at 111.

"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." *Pena, supra* at 310, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "There is a genuine issue of material fact 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 Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The plaintiff must prove the following elements to support a negligence action: (1) defendant owed a duty to plaintiff, (2) defendant breached that duty, (3) an injury proximately resulted from that breach, and (4) plaintiff suffered damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Different standards of care are owed to a plaintiff in accordance with the plaintiff's status on the land. *O'Donnell v Garasic*, 259 Mich App 569; 573; 676 NW2d 213 (2003). "An invitee is one who enters the land of another for a commercial purpose." *Id.*, citing *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). "In general, a premises possessor 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." *O'Donnell, supra* at 573, quoting *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not generally require the removal of open and obvious dangers. *O'Donnell, supra* at 574.

Under MCL 554.139(1)(a), however, the lessor of residential property covenants "[t]hat the premises and all common areas are fit for the use intended by the parties." See also *Allison, supra* at 426. The lessor cannot use the common law open and obvious doctrine to avoid the statutory duty. *Id.* at 425 n 2. "[T]he sidewalks located within an apartment complex constitute 'common areas.'" *Benton v Dart Props*, 270 Mich App 437, 442; 715 NW2d 335 (2006). While "there is no general duty of inviters to take reasonable measures to remove snow and ice for the benefit of invitees unless the accumulation . . . [creates] an unreasonable risk of danger," MCL 554.139 "impose[s] a higher duty on landlords than on other inviters given the enhanced rights afforded tenants . . . and the tenants' reliance on interior sidewalks to access their homes and parking structures." *Benton, supra* at 443 n 2.

In *Benton*, this Court considered a situation similar to the case at bar: the plaintiff slipped and fell on an icy sidewalk at an apartment complex that was owned and maintained by the defendant. *Benton, supra* at 438. The Court explained, "a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. Because the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose." *Id.* at 444.

Benton, which specifically addressed ice-covered sidewalks in residential apartment complexes, comports with the recent Supreme Court decision in *Allison.* The issue in *Allison* involved a slip and fall in a residential apartment complex's parking lot. In addition to a cause of action in negligence, the plaintiff in *Allison* sought relief under MCL 554.139(1)(a) (landlord covenants that the premises and all common areas are fit for their intended use) and MCL 554.139(1)(b) (landlord covenants to keep the premises in reasonable repair). *Allison, supra* at

425. Citing *Benton* for the proposition that sidewalks are "common areas" under the statute, the *Allison* Court agreed that parking lots, too, fell into this category because a parking lot "is accessed by two or more, or all, of the tenants and the lessor retains general control." *Id.* at 428.

In regard to a landlord's duties to keep parking lots free "from the natural accumulation of ice and snow" under MCL 554.139(1)(a), the Court first determined that "the intended use of a parking lot includes the parking of vehicles," therefore, the landlord's duty "would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles." *Allison, supra* at 429. In *Allison,* the plaintiff alleged that the lot was unfit for its intended use because "the lot was covered with one to two inches of snow and . . . [the] plaintiff fell." *Id.* at 430. The Court concluded, "there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles. Accordingly, [the] plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law." *Id.* The Court further explained:

> While 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, it would be triggered only under much more exigent circumstances than those obtaining in this case. 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, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes.
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> We recognize that tenants must walk across a parking lot in order to access their vehicles. However, plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle. The Court of Appeals erred in concluding that, under the facts presented, the parking lot in this case was unfit simply because it was covered in snow and ice. [*Id.*][[1]]

In the *Benton* decision, this Court concluded that a factual issue existed precluding summary disposition. The evidence in *Benton* showed that the apartment complex had salted the sidewalks between 8:00 and 10:00 a.m. and the plaintiff fell around 6:00 p.m. *Benton, supra* at 439, 444. This Court concluded that summary disposition was inappropriate because reasonable minds could differ over whether the defendant's preventative measures amounted to reasonable care, given the weather conditions. *Id*. at 444-445.

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[1] In regard to MCL 554.139(1)(b), the Court held that, "the lessor's duty to repair under MCL 554.139(1)(b) does not apply to common areas and, therefore, does not apply to parking lots. In addition, MCL 554.139(1)(b) requires the lessor to repair defects in the premises, and the accumulation of snow and ice is not a defect. A lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice." *Allison, supra* at 435.

It is thus necessary to consider whether plaintiffs in the case at bar presented evidence that creates "a genuine issue of material fact regarding whether defendant breached its duty under MCL 554.139." *Benton, supra* at 444. In plaintiff Rena's deposition, she stated that sometime between 6:00 and 7:00 a.m. on January 6, 2005, she walked out the double doors at the front of her apartment building. The apartment complex's incident report, however, recorded the incident as having happened at 5:30 a.m. At any rate, plaintiff Rena stated that it was not snowing when she left but she did see snow outside as she was leaving. However, she did not have to walk through any snow from the time she left the building until the time she fell. Plaintiff noted that the area looked as though it had been shoveled; however, she saw neither ice nor salt on the ground before she fell. It was only when she tried to get up that she felt the ice with her hands. Although there was a light in the parking lot, it was not working properly, and it did not illuminate the area of her fall.

Defendant Walker's invoice number 3744 for January 5, 2005, states that defendant Walker applied five tons of salt to defendant Parkview's parking lots only, beginning at 6:00 a.m. and ending at 6:38 a.m. There is no indication that sidewalks were included in this salting. Defendant Parkview's snow removal log states that on January 6, 2005, two employees performed snow blowing and salting of the sidewalks and stairs beginning at 6:00 a.m. and ending at 4:00 p.m. Defendant Walker's invoice number 2938 for January 6, 2005, shows that the company used another five tons of salt on defendant Parkview's parking lots, and it plowed the parking lots, roads and entrances[2] as well. Start and end times, however, are unclear. A second invoice from defendant Walker, number 2941**,** for January 6, 2005, appears to indicate that defendant Walker used an additional four tons of salt on defendant Parkview's parking lots only, beginning at 12:52 p.m. and ending at 1:05 p.m.

Weather records for January 5, 2005, indicate light snow for most of the day (total accumulation 0.13 inches[3]), with temperatures not rising above freezing. Weather records for January 6, 2005, indicate light snow from about midnight to 6:00 a.m., and then a break in precipitation until freezing rain began around 8:40 a.m. Again, temperatures did not rise above freezing at any point during the day.

This evidence appears to indicate that while defendant Walker salted the parking lots on the morning of January 5, 2005, defendant Parkview's employees did not begin snow removal and salting on sidewalks until the morning of January 6, 2005, at about the time plaintiff Rena slipped and fell. Even if the area on which plaintiff Rena fell is considered an "entrance" as opposed to a sidewalk (we know only that it was the area she had to cross to get from the front doors to the parking lot), it would not have been plowed by defendant Walker until the day of her fall at a time unknown. Plaintiff Rena stated in her deposition that she did not see any salt and she felt the ice with her hands after she fell. She also testified that it was dark at the time she fell

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[2] It is not clear if the term "entrances" on defendant Walker's invoice refers to parking lot entrances, building entrances, or both.

[3] Defendant Parkview's snow removal log indicates six inches of snow on January 6, 2005.

– the parking lot light was not working properly, and lights on the front of the building did not adequately illuminate the area.

Thus, like the plaintiff in *Benton,* plaintiffs here established a genuine issue of material fact regarding whether defendants Practical and Parkview breached their duty under MCL 554.139(1)(a) to maintain the sidewalk in a manner fit for its intended use, i.e., walking on it. *Allison, supra*. Given the testimony and maintenance records presented, reasonable minds might differ regarding whether defendants' preventive measures amounted to reasonable care in light of the weather conditions on January 5 and 6, 2005. Therefore, the trial court erred when it granted summary disposition in favor of defendants Practical and Parkview. Moreover, it should be noted that in granting summary disposition, the lower court did not frame the issue in terms of defendants' statutory duty to maintain the common areas in a manner fit for their intended use, rather, the court described defendants' *common law* duty – "the duty to exercise reasonable care to protect [plaintiff] from unreasonable risk of harm caused by dangerous conditions on the land."

In addition, though the lower court did not comment on the issue of notice, plaintiffs argued it below and the parties addressed it in their briefs on appeal. Nevertheless, plaintiffs presented no evidence that defendants Practical and Parkview had actual knowledge of the ice, therefore, "defendant would be liable for plaintiff's injuries only if the condition of the parking lot was caused by defendant's active negligence or the condition 'had existed a sufficient length of time that [defendant] should have had knowledge of it.'" *Derbabian v Mariner's Pointe Assoc LP*, 249 Mich App 695, 706; 644 NW2d 779 (2002), citing *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). Given that it snowed for the entire day on January 5, 2005, and into the early morning hours of January 6, 2005, defendants Practical and Parkview should have known that slippery conditions were likely. In fact, as discussed above, the record indicates that remedial measures were taken. The issue, then, is whether these remedial measures rendered the premises fit for their intended use. As stated, reasonable minds could differ, thus, summary disposition was inappropriate.

Second, plaintiffs contend that the court erred in dismissing plaintiff William's loss of consortium claim against defendants Practical, Parkview and Walker on the grounds that he is not a minor child. We disagree.

The parties dispute whether the decision in *Berger v Weber*, 411 Mich 1, 11; 303 NW2d 424 (1981) in which the mentally retarded and physically handicapped minor child of a severely injured accident victim sought damages "for loss of society, companionship, love and affection of her mother . . ." was limited to minor children. In *Malik v William Beaumont Hosp*, 168 Mich App 159, 165; 423 NW2d 920 (1988), this Court concluded that the word "child" in *Berger* referred to "minor child." "[*Berger* was] based on the unique relationship between minor children and their parents." *Malik supra*, at 167. Therefore, the trial court was correct to dismiss plaintiff William's claim on the basis of his status as an adult child who was over the age of 18 at the time of his mother's injury.

Third, plaintiffs argue that genuine issues of material fact exist in regard to whether defendant Walker breached a duty to plaintiff Rena by negligently removing snow from the premises. We disagree.

In the court below, plaintiffs conceded that they were not intended third-party beneficiaries of the contract between defendants Practical and Walker; hence, defendant Walker owed them no duty under the contract. The issue, then, is whether defendant owed plaintiff Rena a separate and distinct duty, as defined in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). In *Fultz*, the plaintiff fell and injured her ankle while walking across a parking lot, for which the defendant was under contract to provide snow and ice removal. *Id*. at 462. At the time the plaintiff in *Fultz* fell, the defendant "had not plowed the lot in approximately fourteen hours and had not salted the parking lot." *Id*. This Court upheld a jury verdict, which found the defendant negligent for having failed to perform the contract. *Id*. The Supreme Court, however, held, "as a matter of law, that defendant owed no contractual or common-law duty to plaintiff to plow or salt the parking lot." *Id.* at 463.

The Court further explained that there was no need to undertake a misfeasance versus nonfeasance analysis, because this results in an improper focus

> on whether a duty was breached instead of whether a duty exists at all. Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Fultz, supra* at 467.]

In *Fultz*, the plaintiff claimed that the defendant breached its contract with the premises owner "by failing to perform its contractual duty of plowing or salting the parking lot." *Id.* at 468. Thus, plaintiff failed "to satisfy the threshold requirement of establishing a duty . . . owed to her under the 'separate and distinct' approach set forth in this opinion." *Id.*

The *Fultz* Court then distinguished *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), upon which plaintiff in the case at bar relies. In *Osman*, "the defendant had breached a duty separate and distinct from its contractual duty when it created a new hazard by placing snow 'on a portion of the premises when it knew, or should have known or anticipated, that the snow would melt and freeze into ice on the abutting sidewalk, steps, and walkway, thus posing a dangerous and hazardous condition to individuals who traverse those areas.'" *Fultz, supra* at 469, quoting *Osman*, *supra* at 704.

In the case at bar, plaintiffs claim that defendant Walker created an additional hazard. At the motion hearing, plaintiffs argued that defendant Walker put down salt, but did nothing else; hence, the salt melted the snow, which then refroze. Defendant Walker salted only the parking lot, however, on the day *before* plaintiff Rena fell. While it is not entirely clear where plaintiff Rena fell, it is certain that she did not fall in the parking lot. If the area where plaintiff Rena fell is considered an entrance, it was plowed, but not salted, by defendant Walker at a time unknown, on January 6, 2005. Plaintiffs' appellate brief offers only conjecture that melted snow was tracked by unknown persons from the area that defendant Walker *did* salt, onto the area where plaintiff fell, and then refroze. There is absolutely no evidence in the record to support this hypothesis. "Parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Detroit v GMC*, 233 Mich App 132, 139-140; 592 NW2d 732

(1998), quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Therefore, the trial court properly concluded that plaintiffs failed to present evidence of a genuine issue of material fact regarding whether defendant Walker created an additional hazard. Summary disposition was thus appropriate.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello