STATE OF MICHIGAN

COURT OF APPEALS

JOHN C. DOUGHERTY,

Plaintiff-Appellant,

v

NYKEL-SOMERSET MANAGEMENT, LLC, and SOMERSET APARTMENTS, LLC,

Defendants-Appellees.

UNPUBLISHED
September 4, 2012

No. 303910
Oakland Circuit Court
LC No. 2010-111126-NO

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

GLEICHER, P.J. (*concurring*).

I concur with the lead opinion. I write separately to respectfully respond to the legal arguments advanced by the dissent.

Plaintiff alleges that he slipped and fell on a sidewalk sheathed in black ice. A low-wattage incandescent light bulb "located in the shade of a large evergreen tree" poorly illuminated the area. Plaintiff contends that the sidewalk's inadequate lighting eliminated his ability to detect the ice. The lead opinion concludes that a jury should decide whether defendants breached their statutory duty to maintain the sidewalk in a manner "fit for the use intended by the parties," MCL 554.139(1)(a), or their common law duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the premises, or both.

The dissent posits that plaintiff's failure to produce evidence "that he or any other tenant had ever informed defendant[s] of a problem with either ice or the lighting" supports summary disposition in defendants' favor. *Post* at 1. According to the dissent, defendants bore no "duty to inspect the premises on a regular basis to determine if any defects exist, but only . . . to repair any defects *brought to his attention* or found by *casual inspection* of the premises." *Post* at 4 (emphases in original). In my view, the dissent misapprehends the constructive notice doctrine and its application to defendants' statutory and common-law duties.

A landlord's statutory obligation under MCL 554.139 encompasses the duty to maintain common areas in a condition "fit for the use intended by the parties." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This statutory duty is greater than the duty owed to invitees under common-law premises liability principles. See *Jones v Enertel, Inc*, 467 Mich 266, 267; 650 NW2d 334 (2002). The parties agree that the sidewalk on which plaintiff fell constitutes a common area. "[T]he intended use of a sidewalk is walking on it." *Benton v*

Dart Props, Inc, 270 Mich App 437, 444; 715 NW2d 335 (2006). Tenants walk on common-area sidewalks at all hours of the day and night. The sidewalk on which plaintiff fell provided access to his home. Based on the record evidence, a jury could reasonably conclude that the poorly lit sidewalk covered in ice was unfit for the use intended.

Relying on *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978), the dissent asserts that because defendants had no obligation to search for defects by regularly inspecting the premises, notice of a dangerous condition cannot be imputed. *Post* at 3. I believe the dissent misconstrues *Raatikka*. In that case, this Court held that "the landlord was under a duty to repair all defects of which he knew *or should have known*." *Raatikka*, 81 Mich App at 430 (emphasis added). That a landlord's duty does not include regular inspections of the premises does not absolve the landlord of the duty to correct readily observable dangers. Similarly, the common law requires a landlord to "take reasonable care to know the actual conditions of the premises and either make them safe or warn the invitee of dangerous conditions." *Kroll v Katz*, 374 Mich 364, 373-374; 132 NW2d 27 (1965).

Plaintiff testified that only a low-wattage bulb, dimly appearing through the branches of a large evergreen tree, illuminated the sidewalk leading to his apartment. His testimony stands unrebutted in this record. This evidence enables a jury to reasonably conclude that defendants knew or should have known that the sidewalk leading to plaintiff's apartment was poorly lit due to both the wattage of the bulb defendants installed and the condition of the tree.

In *Conerly v Liptzen*, 41 Mich App 238; 199 NW2d 833 (1972), this Court recognized that the landlord's knowledge of the "actual conditions" of the premises requires adequate inspection to discover latent dangers:

> "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, *but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use*." [*Id*. at 241-242, quoting Prosser, Torts (3d ed), § 61, pp 402-403 (emphasis added).]

Indisputably, an invitor's duty encompasses reasonable inspection intended to detect dangerous conditions on the premises. Accordingly, defendants owed plaintiff the duties to (1) inspect the lighting conditions of common areas; (2) discern that the low-watt bulb covered by tree branches cast inadequate light; and (3) replace the light fixture or bulb and trim the branches. Defendants' failure to discover the inadequately lit sidewalk tends to *prove* their negligence rather than excuse it.

Nor does the absence of a prior complaint of inadequate lighting relieve defendants of their legal duties as invitors. The dissent contends that "[n]o evidence was set forth that any maintenance person inspected the building and noticed a lighting issue prior to plaintiff's fall."

Post at 1-2. But the constructive notice doctrine contemplates liability if a defendant *should have known* of a dangerous condition on the premises, and does not shield a premises owner or possessor from liability for injury where the premises owner or possessor itself unreasonably creates, tolerates or causes a dangerous condition. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 604-605; 601 NW2d 172 (1999). And "[g]enerally, 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 v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007), citing *Kroll*, 374 Mich at 371.

Moreover, a finding of constructive notice often depends on the involved lapse of time. The longer a defect is present the *stronger* the evidence of constructive notice. An invitor is liable when an unsafe condition "is known to the storekeeper or *is of such a character or has existed a sufficient length of time that he should have knowledge of it*." *Carpenter v Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937) (emphasis added). "Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). "[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*, 374 Mich at 372. Given that trees grow slowly and defendants installed the light bulb, a jury may reasonably infer that the poor lighting condition should have been readily apparent to defendants, and likely existed for a considerable period of time before plaintiff fell.

In summary, uncontradicted evidence supported that plaintiff's fall was the product of ice rendered invisible due to darkness. While defendants had no actual notice of the ice, they knew or should have known that after normal business hours during the winter months, the sidewalks could become slippery. A jury could reasonably conclude that defendants also knew or should have known that absent adequate lighting, tenants attempting to enter their apartments would have difficulty recognizing and protecting themselves against the presence of ice. Given these circumstances, the trial court erred by granting summary disposition to defendants.

/s/ Elizabeth L. Gleicher