STATE OF MICHIGAN

COURT OF APPEALS

IRVING ALLISON,

Plaintiff-Appellant,

v

AEW CAPITAL MANAGEMENT, L.L.P., d/b/a SUTTON PLACE APARTMENTS,

Defendant,

and

VILLAGE GREEN MANAGEMENT COMPANY and BFMSIT II,

Defendants-Appellees.

FOR PUBLICATION
November 28, 2006
9:15 a.m.

No. 269021
Oakland Circuit Court
LC No. 2005-063356-NO

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants. We affirm. This case is being decided without oral argument. MCR 7.214(E).

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was a tenant of an apartment building. He slipped and fell on an accumulation of snow and ice as he attempted to reach his car in the parking lot. Although the location of the fall was not clearly specified during plaintiff's deposition, he acknowledges that his fall occurred in the parking lot, rather than on the sidewalk. Plaintiff brought this action against defendant AEW Capital Management (AEW), alleging, among other things, that AEW had breached its common-law duty to protect and warn plaintiff and its statutory duty as a landlord under MCL 554.139(1).

AEW moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff's common law claims were barred because the danger was open and obvious. It further argued that plaintiff could not rely on MCL 554.139(1) because the statute does not apply to natural accumulations of snow and ice. The trial court granted AEW's motion. The pleadings

were amended to substitute defendants Village Green Management Company and BFMSIT II for AEW.

II. ANALYSIS

On appeal, plaintiff argues that the open and obvious danger doctrine does not bar his claim that defendants violated the statutory duty imposed by MCL 554.139(1). In *Benton v Dart Properties Inc*, 270 Mich App 437, 443-444; 715 NW2d 335 (2006), this Court stated that a tenant's claim against a landlord resulting from injuries the tenant sustained in a fall on an icy sidewalk in his apartment complex implicated the landlord's duty to keep common areas fit for their intended use under MCL 554.139(1)(a) and that "[b]ecause the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose." We explicitly held that the open and obvious danger doctrine did not bar the plaintiff's claim against the defendant for violating its statutory obligation under MCL 554.139(1)(a). *Id.* at 445. Plaintiff invites this Court to extend the holding in *Benton* to parking lots and apply the reasoning of *Benton* to the facts of this case.

We decline plaintiff's invitation to extend *Benton* to the facts of this case because under MCR 7.215(J)(1), we are bound by our decision in *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005). Like the present case, *Teufel* involved a plaintiff who fell on ice in the parking lot of an apartment complex. *Teufel*, *supra* at 426. This Court reasoned that the landlord's duty to remove snow and ice from the parking lot was not controlled by MCL 554.139(1), and therefore concluded that the open and obvious danger doctrine barred the plaintiff's claim:

> Plaintiff also argues that the trial court erred when it failed to address his argument that [the defendant] had a statutory duty under MCL 554.139 to keep its premises and common areas in reasonable repair and fit for their intended uses, which negates the defense of open and obvious danger. Any error in the trial court's failure to address this argument is harmless. The plain meaning of "reasonable repair" as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises. Thus, a lessor's duty under MCL 554.139(1)(a) and (b) to keep its premises in reasonable repair and fit for its intended use does not extend to snow and ice removal. [*Id*. at 429 n 1.]

Pursuant to *Teufel*, we are constrained to rule that an individual who is injured as a result of snow and ice accumulation in the parking lot of an apartment complex may not rely on the statutory duties imposed by MCL 554.139(1)(a) and (b) to avoid application of the open and obvious doctrine. MCR 7.215(J)(1). Notwithstanding our obligation to follow *Teufel* under MCR 7.215(J)(1), however, we observe that there are two deficiencies in the holding in footnote 1 of *Teufel*. First, the footnote does not attempt to distinguish or even mention this Court's opinion in *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003), which held that 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) and (b). In fact, the *Teufel* opinion does not cite or discuss *O'Donnell* anywhere. Second, the footnote in *Teufel* conclusively asserts that a landlord's "duty under MCL 554.139(1)(a) and (b) to keep its premises in reasonable repair and fit for its intended use does not extend to snow and

ice removal" without ever conducting an analysis under both MCL 554.139(1)(a) and MCL 554.139(1)(b) to determine whether the landlord's duty extended to snow and ice removal. *Teufel, supra* at 429 n 1. Furthermore, we note that it is generally ill advised for an opinion to render a holding in a footnote. Had our Court in *Teufel* intended to create a rule of law regarding a landlord's duty to remove snow and ice under MCL 554.139(1)(a) and (b), it should have done so in the body of the opinion rather than in a footnote. See *Guerra v Garratt*, 222 Mich App 285, 289-292; 564 NW2d 121 (1997) (holding that a footnote in the Supreme Court's opinion in *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995), did not create an exception to the general holding of *Lemmerman* because the Supreme Court would have written such an exception into the text of the opinion and not merely in a footnote).

III. CONCLUSION

Despite our disagreement with *Teufel*, it is controlling, and we must follow it as binding precedent. MCR 7.215(J)(1). We therefore affirm the trial court's grant of summary disposition in favor of defendants. However, because we would follow the rule of *Benton* in the absence of *Teufel*, we declare a conflict between the present case and *Teufel*. MCR 7.215(J)(2).[1]

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

[1] Plaintiff also argues that even if the condition was open and obvious, it was effectively unavoidable, and therefore a special aspect as articulated in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-519; 629 NW2d 384 (2001). However, the facts of the present case are more comparable to those in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 117-118; 689 NW2d 737 (2004) (Griffin, J., dissenting), rev'd for the reasons stated in dissent 472 Mich 929 (2005). In *Kenny*, the snow in the defendant's parking lot covered the ice on which the plaintiff fell. Our Supreme Court agreed with Judge Griffin's dissenting opinion, finding that there were no special aspects creating a uniquely high likelihood of harm. Noting that snow and ice are common conditions in Michigan, Judge Griffin stated that "[u]nder the *Lugo* . . . definition of 'special aspects,' ice and snow do not present 'a *uniquely high* likelihood of harm or severity of harm.'" *Kenny*, *supra* at 121 (Griffin, J., dissenting). Thus, assuming *arguendo* that MCL 554.139 does not apply in the present case, plaintiff has not established a genuine issue of fact concerning whether there were special aspects that made the condition unreasonably dangerous despite its open and obvious nature.