STATE OF MICHIGAN

COURT OF APPEALS

DELLA DOTSON,

Plaintiff-Appellant,

v

GARFIELD COURT ASSOCIATES, L.L.C. d/b/a GARFIELD COMMONS and BROOKLINE MANAGEMENT COMPANY,

Defendants-Appellees.

UNPUBLISHED
August 7, 2014

No. 315411
Oakland Circuit Court
LC No. 2011-003427-NI

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition and an order denying plaintiff's motion for reconsideration. We reverse and remand for further proceedings consistent with this opinion.

This case arises from an incident that occurred on January 12, 2011. Plaintiff lived in defendants' apartment complex, and left her apartment at 5:15 a.m. to go to work. Before she left, she took her garbage to the complex's community trash bin, located in the parking lot. Plaintiff had lived in her apartment for several months, and stated that there were numerous potholes in the parking lot. In addition, on the morning in question, it was dark outside and there was snow covering the parking lot. The parking lot had been plowed and salted the evening before and earlier that morning, but more snow had accumulated since the parking lot was plowed. As plaintiff was walking to the trash bin, she stepped into a snow-covered pothole and fell. Plaintiff then drove herself to the emergency room, and suffered a fractured ankle. Later, plaintiff filed an action against defendants for negligence.

Plaintiff argues the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motion for reconsideration because there was a question of fact whether defendants breached their statutory duty to plaintiff pursuant to MCL 554.139(1)(a) to keep the parking lot fit for its intended use. We agree.

A trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). Initially, the moving party must support its claim for summary disposition by affidavits,

depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. The court reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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." *Id.*

A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. at 605-606.

MCL 554.139(1) provides:

> (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).]

In *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), the Michigan Supreme Court analyzed MCL 554.139(1). The Court stated:

> MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law. The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy. [*Allison*, 481 Mich at 425-426.] [emphasis in original.]

The *Allison* Court considered whether a parking lot covered in snow and ice was fit for the use intended by the parties. *Id*. at 429-431. The Court held that a parking lot was a common area pursuant to MCL 554.139(1)(a). *Id*. at 429. The primary purpose of a parking lot is the parking of vehicles. *Id.* "A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id.* The Court held that a parking lot covered in snow and ice did not render a parking lot unfit for its intended purpose. *Id*. at 430-431.

Defendants contend that *Allison* controls in this case. We disagree, however, and find that the facts of the current case are distinct from the facts presented to the Court in *Allison*. Plaintiff alleges that a snow-covered *pothole* made the parking lot unfit. Snow and ice, alone, did not create the hazardous condition. Defendants admitted that they knew there were many potholes in the parking lot, yet neglected to fix this condition before the winter. Failure to correct this defect, combined with the perils presented by snow and ice, create a question of fact regarding whether the parking lot, a common area, was fit for the use intended by the parties. There is also a question of fact whether the condition of the parking lot, which was riddled with potholes hidden by snow, allowed residents of the complex reasonable access to their vehicles and to the community garbage bins, which were only accessible through the parking lot. For this reason, the trial court erred in failing to consider this issue and in denying plaintiff's motion for reconsideration.

Plaintiff also argues that the trial court erred in denying plaintiff's motion to reinstate the case and for leave amend her complaint because there was no justification for denying the motion.[1] We agree. "This Court reviews a trial court's decision to permit a party to amend its pleadings for an abuse of discretion." *Williams v Kent (In re Estate of Kostin)*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

MCR 2.116(I)(5) provides that "If the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). An amendment would be futile if ignoring the substantive merits of the claim, it is legally insufficient on its face. *PT Today, Inc v Commr of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

The trial court denied plaintiff's motion to reinstate the case and for leave to amend her complaint because it found that plaintiff's complaint would be futile because the parking lot, as a matter of law, was fit for its intended use. As stated, we hold that plaintiff's claim regarding MCL 554.139(1)(a) had merit. Therefore, amendment would not have been futile, and the trial court abused its discretion in denying plaintiff's motion to amend her complaint.[2]

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[1] To preserve an issue for appellate review, it must be raised, addressed, and decided in the lower court. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). At the time of this appeal, this issue was not properly preserved because the trial court had not issued a decision, and defendants assert that we lack jurisdiction for the same reason. However, the trial court subsequently issued a decision on plaintiff's motion to amend her complaint and we address this issue in the interest of completeness and judicial economy.

[2] Plaintiff also argues that the trial court erred in denying its motion for reconsideration because it improperly relied on *Allison* in holding that plaintiff was only entitled to a contract remedy

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition because there was a question of fact whether the pothole was open and obvious because it was covered in snow and it was dark outside. We agree. Once again, a trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins*, 491 Mich at 553.

Generally, a premises possessor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). A premises possessor does not owe a duty to warn or protect an invitee from dangers that are open and obvious. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis*, 296 Mich App at 694. In addition, a common pothole is open and obvious because an average person of ordinary intelligence would be able to observe and avoid the condition. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 520; 629 NW2d 384 (2001). If a condition is open and obvious, liability arises only if there were special aspects to the condition. *Hoffner*, 492 Mich at 461.

The trial court erred in granting defendants' motion for summary disposition and finding, as a matter of law, that the hazardous condition was open and obvious. While Michigan Courts have repeatedly held that snow-covered walkways and potholes are considered open and obvious separately, this case is distinct. *Buhalis*, 296 Mich App at 694; *Lugo*, 464 Mich at 520. Here, the danger complained of by plaintiff was specifically the pothole, because that was the cause of plaintiff's fall. While an ordinary pothole may be considered open and obvious, we do not agree that a pothole that is covered in snow and thus hidden from sight is open and obvious. In particular, here, we have a situation where the parking lot was littered with pot holes. The potholes were so extensive that plaintiff was unable to know the exact location of each pothole. During the winter, the potholes filled with snow. When potholes fill with snow originally, the snow would be uneven, making it clear where the potholes were in the parking lot. However, here, the parking lot had recently been plowed; leaving the potholes filled with snow to a level even with the pavement of the parking lot, and it had subsequently snowed, covering the parking lot and snow-filled potholes to a uniform depth. Therefore, the snow on the parking lot was level, making it unclear where the potholes were. We do not see how plaintiff could have seen the pothole in such a condition. Moreover, plaintiff testified that she could not see the pothole before she fell, and that the parking lot was dark, which further obstructed her ability to view the pothole. For these reasons, the trial court erred in granting defendants' motion for summary

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pursuant to MCL 554.139(1)(a). Because we find that there is a question of fact regarding whether the parking lot was fit for its intended use, and that plaintiff should be permitted to amend her pleadings to include a contact claim, we decline to address the appropriateness of plaintiff's remedy at this stage, and reverse and remand for further proceedings to determine what, if any, remedy is appropriate in this case.

disposition because there is a question of fact regarding the open and obvious nature of the pothole.

Reversed and remanded for proceedings consistent with this opinion. Plaintiff, the prevailing party, may tax costs. MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood