STATE OF MICHIGAN

COURT OF APPEALS

PAMELA BRANCH,

Plaintiff-Appellant,

v

D & S PROPERTY MANAGEMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
December 26, 2019

No. 345882
Macomb Circuit Court
LC No. 2017-001162-NO

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

Plaintiff Pamela Branch slipped and fell twice on the same day. The first fall occurred on a common-area sidewalk, and the second on the steps of her unit. The day was cold, snowy, and icy. Her testimony and that of an expert witness substantiated that the outdoor surfaces of her apartment premises (sidewalks and steps) were coated in ice and snow. Branch used her back door in and out of her apartment because it was closest to her targets (her parked car and her mother's nearby unit).

Branch sued the apartment complex, defendant D & S Property Management, under MCL 554.139(1)(a). This statute imposes a duty on landlords to maintain common areas in a condition "fit for the use intended by the parties." The majority holds that Branch's statutory claim survives summary disposition and I agree, albeit for different reasons. I respectfully dissent as to the dismissal of Branch's premises liability claim.

I. BRANCH'S STATUTORY CLAIM

Defendant contends that because Branch was able to walk on the sidewalk twice without falling, the sidewalk was fit for its intended use. The majority concludes that a question of fact exists regarding the sidewalk's fitness, reasoning that on the fall-free occasions Branch may have walked with extra care or avoided the most slippery spots. These observations are logical but irrelevant. Defendant's argument that the sidewalk was fit because there had been no previous accidents (involving Branch or anyone else) should be rejected because it conflicts with a longstanding legal principle: evidence of the absence of accidents involves unreliable negative

evidence and generally is not probative of a party's negligence. *Grubaugh v City of St Johns*, 82 Mich App 282, 287; 266 NW2d 791 (1978). Just as another tenant's slip and fall on the sidewalk would not have definitely proved defendant's negligence, "it would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v Vanderlinde*, 165 Mich 464, 468; 131 NW 165 (1911).[1]

Defendant also suggests that Branch's decision to use the back door rather than the front door defeats her statutory claim. But defendant presented no evidence regarding the sidewalk conditions in the front of the apartment. MCR 2.116(G)(4) assigns to the *moving* party the task of identifying "the issues as to which the moving party believes there is no genuine issue as to any material fact." If evidence actually exists that the front-door route was safe, it does not appear in the record. Therefore, Branch had no duty to address this question.

II. "MERE INCONVENIENCE"

Citing *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275; 933 NW2d 732 (2019), the majority engages in an analysis of defendant's contention that the ice and snow covering the common areas created a "mere inconvenience," thereby absolving defendant of liability. Correctly, the majority rejects this argument. To the extent *Trueblood* requires a "mere inconvenience" analysis in cases brought under MCL 554.139(1)(a), *Trueblood* misstates the law.

The *Trueblood* Court found that a question of fact existed regarding whether the sidewalk at issue "was completely covered in ice, making the ice more than a mere inconvenience." *Trueblood*, 327 Mich App at 290. "[A] sidewalk completely covered in ice," the Court explained, "is not fit for its intended use, because it does not present a '[m]ere inconvenience of access'; anyone walking on a sidewalk completely covered in ice would be forced to walk on ice, and there is no way to simply walk around it." *Id*. at 291 (citations omitted). The majority deems this case analogous.

To the extent that *Trueblood* requires a court to consider whether a sidewalk condition is merely "inconvenient" and therefore not actionable, I respectfully disagree with *Trueblood*. The "mere inconvenience" language derives from *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 430; 751 NW2d 8 (2008). The primary issues presented in *Allison* were whether a parking lot constituted a "common area" under MCL 554.139(1)(a), and whether a lessor had a duty under the statute "with regard to the accumulation of snow and ice in a parking lot." *Allison*, 481 Mich at 430.

A parking lot is a common area, the Supreme Court acknowledged, but analyzed the duty to keep a parking lot "fit for the use intended by the parties" under MCL 554.139(1)(a) based strictly on the "intended use" of a parking lot. *Allison*, 481 Mich at 428-429. The Court

[1] One obvious reason for this rule is that another tenant may have slipped and fallen, but not suffered injury or elected not to report the fall.

explained that the "intended use" of a parking lot is "parking" and "storing" vehicles. *Id*. at 429. Therefore, the Court reasoned,

> 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. A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly 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. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used. [*Allison*, 481 Mich App at 429.]

The evidence of parking lot unfitness presented in *Allison* consisted of one to two inches of snow, with ice underneath in the areas where the snow had been "displaced." *Id*. at 423. In the Supreme Court's view, this evidence did not suffice to restrict ingress or egress to the parking lot. In other words, a small amount of snow and ice did not deny tenants "reasonable access" to their vehicles. In this context—parking lots harboring a relatively benign amount of snow—the Court added:

> 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. [*Id*. at 430.]

Notably, the "mere inconvenience" concept was limited in *Allison* to a parking lot. Because a sidewalk serves an entirely different "intended use" than a parking lot, the duty to maintain a sidewalk differs meaningfully from that required for a parking lot. *Allison* explicitly recognized this distinction: "A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be *to ensure that the entrance to, and the exit from, the lot is clear*[.]" *Allison*, 481 Mich at 429 (emphasis added). The means of parking lot entry and exit are sidewalks.

Tenants also use sidewalks to enter and exit from their homes. Stairs and banisters function in the same way. As this Court stated in *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010), the standard of care is the preservation of *reasonable* access to and from the premises.

Parties to a lease understand and intend that sidewalks and steps serve purposes different from parking lots. Lessors have a duty to keep the premises "fit" for those intended uses: walking on them. Parking lots are vehicle storage locations, but sidewalks are places for *people* to walk. While a tenant might be inconvenienced at having to maneuver around snow and ice in a parking lot, the presence of that condition does not automatically render the lot "unfit" for parking a vehicle. But the presence of snow and ice on a sidewalk (of which the lessor has reasonable notice, as here) *does* render the sidewalk potentially unfit, even if a tenant could trek through grass, bushes, or slide over a frozen lake to avoid walking on it. A sidewalk is all about

"access." Therefore, "[m]ere inconvenience of access," when applied to a sidewalk, is an oxymoron.

It goes without saying that a plaintiff who chooses to walk on an icy sidewalk rather than to take an obviously safer path may be found comparatively negligent. But this legal truism does not alter the landlord's duty to maintain the sidewalk or the banister. Both parties must exercise reasonable care. The "mere inconvenience" formulation applied in *Truebolood* to a statutory claim should not be available as a complete defense to a suit involving common areas intended for access to and from one's home.

III. NEGLIGENCE CLAIM

The majority holds that Branch's premises liability claim is foreclosed based on a related doctrine: the snowy and icy sidewalk and banister were "effectively avoidable." The majority asserts that Branch "was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building." This portion of the majority's analysis finds its genesis in *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). I have previously examined the doctrinal weaknesses of *Hoffner*, and will not restate that particular analysis here. See *Deas v Hartman & Tyner, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2019 (Docket No. 340068) (GLEICHER, J., concurring). The facts of this case provide additional grounds for a careful reexamination of *Hoffner*.

Before addressing those grounds, I respectfully suggest that the majority has misapplied the "effectively unavoidable" doctrine by holding that Branch "had the option to enter and exit her apartment building through the front door," and therefore "was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building." This is undoubtedly true, but critical facts are missing: a description of the conditions outside her front door. No evidence supports that that the front-door route offered safer passage than the path from the rear door. Rather, the evidence presented to the trial court substantiates that *every* surface in the apartment complex was covered in ice and snow, and that taking the front door would have required Branch to spend *more* time traversing the dangerous terrain. Plaintiff testified that there was snow "everywhere," and her expert submitted an affidavit, averring, in relevant part:

> 7. The meteorological facts indicate that the ice Plaintiff encountered would have existed on untreated surfaces at the location of this incident in Warren, Michigan both at 10:00 A.M. and 8:50 P.M. on 2 February 2015.
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> 8. The meteorological facts indicate that this ice was caused by melting of residual snow and ice on 31 January 2015, which then froze into ice no later than 3:00 A.M. on 1 February 2015. This was then covered by a ten inch snowfall that began on the 1st and ended by 8:00 A.M. on the 2nd. The snow would not have changed the physical characteristics of the ice in any manner whatsoever.
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> 9. Thus, the meteorological facts indicate clearly and unambiguously that the ice Plaintiff encountered had existed for thirty-one hours before her first fall, and for forty-two hours before her second fall.

I would hold that defendant has utterly failed to support its claim that the dangerous condition was "effectively unavoidable."

More importantly, the "effectively unavoidable" doctrine contradicts bedrock tort principles, and should be jettisoned for that reason.

Under *Hoffner*, an open-and-obvious danger precludes a premises liability claim unless the danger is "effectively unavoidable," a term interpreted in *Hoffner* to mean "an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Hoffner*, 492 Mich at 456.[2] As framed by *Hoffner*, the issue is one of "choice." *Id*. at 469. The Court elaborated, "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required or compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. (emphasis in original).

At its core, this analysis is nothing more than a surreptitious resurrection of a long-dead tort precept: assumption of the risk. The now-discredited and abandoned assumption of the risk doctrine began as a defense available only in "cases involving the master-servant relationship," but its reach gradually expanded to include "every conceivable kind of negligence action." *Felgner v Anderson*, 375 Mich 23, 39-40; 133 NW2d 136 (1965). As the Supreme Court pointed out in *Felgner*, 375 Mich at 42, the defense was applied "as a virtual synonym of contributory negligence[.]" "[T]he gist of the defense is that the plaintiff took his chances." *Waltanen v Wiitala*, 361 Mich 504, 508; 105 NW2d 400 (1960).

In *Felgner*, 375 Mich at 46, the Supreme Court officially eliminated the defense in most applications, characterizing its history in our state as "an indefensible misuse of a legal doctrine whose foundations in justice, even when applied properly, are tenuous at best."[3] The Court

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[2] The "effectively unavoidable" framework is not a recognized tort doctrine outside of Michigan. A Westlaw search reveals that no other state has adopted this theory as part of its "open and obvious" jurisprudence.

[3] In support of this proposition, the Supreme Court quoted from an article by Fleming James, Jr., *Assumption of Risk*, 61 Yale L J 141, 168-169 (1952), worthy of reprinting here:

> "The doctrine of assumption of risk, however it is analyzed and defined, is in most of its aspects a defendant's doctrine which restricts liability and so cuts down the compensation of accident victims. It is a heritage of the extreme individualism of the early industrial revolution. But quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. The one exception is to be found, perhaps, in those cases where there is an actual agreement. Moreover, the expression has come to stand for two or three distinct notions which are not at all the same, though they often overlap in the sense that they are applicable to the same situation.

declared that assumption of the risk "should not again be used in this State as a substitute for, or as a supplement to, or as a corollary of, contributory negligence . . . . The traditional concepts of contributory negligence are more than ample to present that affirmative defense to established negligent acts." *Id*. at 56.

Here, an orthodox application of *Hoffner* would not focus on the availability of the front steps, but instead would announce that because Branch had a choice to just stay home, the snow and ice on the sidewalk were "effectively avoidable." According to *Hoffner*, tenants must elect to be prisoners in their homes rather than risk falling; if they choose to walk, they alone must pay the price for the landlord's negligence. I suggest a return to the real world of tort. A duty of care is owed to those who may foreseeably suffer injury due to the negligence of a landowner. If the danger created by the landowner's negligence is open and obvious, a jury should decide whether a plaintiff was negligent in having confronted it. And a jury must weigh that negligence against that of the landowner who failed to ameliorate the danger. A tenant who chooses to go out into the snow and ice so she can exercise or take care of her elderly mother may have made a negligent choice. But that is for a jury to decide. "A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care." *Klopp v Wackenhut Corp*, 824 P2d 293, 297 (1992, NM Sup Ct). The relevant inquiry evaluates and compares the conduct of the parties against the standards of care. Whether a danger was "effectively unavoidable" may play a role in that analysis, but should not dictate the outcome.

/s/ Elizabeth L. Gleicher

> Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion. For the most part the policy of individualism it represents in outmoded in accident laws; where it is not, that policy can find full scope and far better expression in other language. There is only one thing that can be said for assumption of risk. In the confusion it introduces, it sometimes—ironically and quite capriciously—leads to a relaxation of an overstrict rule in some other field. The aura of disfavor that has come to surround it may occasionally turn out to be the kiss of death to some other bad rule with which it has become associated. We have seen how this may happen with the burden of pleading and proving an exceptional limitation on the scope of defendant's duty. There may be other instances. But at best this sort of thing is a poor excuse indeed for continuing the confusion of an unfortunate form of words." [*Felgner*, 375 Mich at 46 n 7.]