

STATE OF MICHIGAN
COURT OF APPEALS

AIKATERINI ROUSAKI,

Plaintiff-Appellant,

v

LOLA SOULIOTIS,

Defendant-Appellee.

UNPUBLISHED

March 5, 2013

No. 308139

Washtenaw Circuit Court

LC No. 10-001393-NO

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I dissent from the majority's conclusion that *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008) mandates dismissal of plaintiff's claim brought under MCL 554.139(1)(a). The statute 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.

This duty is not to be seen narrowly. Indeed, the Legislature saw fit to include language to the contrary in the statute, stating: "[t]he provisions of this section shall be liberally construed." MCL 554.139(3).

In *Allison*, the plaintiff tenant fell while walking through the parking lot of the building. The Supreme Court concluded that a parking lot is fit for its intended use where "the tenants are able to park their vehicles and have reasonable access to their vehicles." 481 Mich at 429. The *Allison* court was careful to note that whether or not the lot was fit pursuant to that standard constituted a *factual* determination. It considered the factual record and found that plaintiff had failed to submit sufficient evidence to create a question on that issue of fact. The Court noted that the only evidence to suggest a lack of fitness was that the lot had an inch or two of snow on it and stated that "under the facts presented in this record we believe that there could not be reasonable differences of opinion regarding the fact that the tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles." *Id.* at 430.

The majority errs by ignoring this analysis in *Allison*. The *Allison* Court could have concluded as a matter of law that snow and ice on residential parking lots or walkways cannot interfere with the areas intended use. However, it did not do so. Instead, it considered whether the record before it created a question of fact on the issue. The majority, however, suggests by implication, if not explicitly, that the Supreme Court in *Allison* simply decided to insert the words “except for snow and ice” into the text of the statute written and passed by the Legislature which did not include any such limitation and which by its own terms is to be “liberally construed.”¹ While our Supreme Court has demonstrated a clear unwillingness to impose such *common law* duties, I decline to conclude, as the majority does, that the Supreme Court would engage in such a usurpation of *legislative* power.

We must therefore, in keeping with *Allison*, determine whether there is sufficient evidence to establish a question of fact in this case regarding the “fitness” of the relevant area for its “intended use.” We are not privy to the record in *Allison*, but the description provided by the Supreme Court demonstrates that it bears no resemblance to the evidence submitted in this case that demonstrates conditions and uses well beyond the ones in that case.

In this case, it is uncontested that the area where plaintiff fell was not a parking lot nor merely a “driveway” as the majority suggests. According to the defendant-landlord’s sworn testimony, it serves as the only path provided for tenants to walk from the single door of the building to the large outdoor garbage can. The photographs in the record reveal that the path is ice-covered and runs from the front of the building to the garbage can placed near the back of the building. They also reveal that the condition substantially worsens as one approaches the garbage can itself which is surrounded by several inches of uneven frozen snow and ice. This worsened condition around the garbage can was explained by the landlord’s testimony that when the driveway was shoveled, the snow would be piled up around the garbage can.

Thus, having traversed an icy path with garbage bag in hand, a tenant must then negotiate several inches of uneven frozen snow and ice precisely at the area where a person would stand as they shift their weight, lift the can’s lid, raise a garbage bag to a height above the can, drop it in the can and replace the lid while readjusting their weight. Indeed, this is precisely the scenario described by plaintiff in her testimony as she described why she fell:

“The problem is when you lift a big bag with trash and put it in a can, then your balance is not so good or as good as it was when you walk and you are stable and you don’t have any weight on you, and when you have a weight high, when you are not that stable, so , and when you just put [the bag] in the can and you lift your hand back and try to re-stabilize and walk away – and that was the time that I fell because I did not re-stabilize well when I [put] the garbage in.”

¹ The majority’s holding is also contrary to a published opinion of this Court. In *Hadden v McDermitt Apartments*, 287 Mich App 124, 182; 782 NW2d 800 (2010) we concluded that “*Allison* made it clear that an accumulation of snow and ice could implicate a landlord’s duty to keep the premises and all common areas fit for the use intended.”

The “intended use” of this path was for people to carry garbage bags and the “intended use” of the area immediately adjacent to the garbage can was for tenants to carry out the series of actions involving substantial shifts of weight by which someone puts a bag of garbage in a trash can. The question is whether a reasonable jury could conclude that a common-area used for such actions is not fit for its intended purpose where the path is ice-covered and where the area directly around the garbage can is surrounded by uneven piles of snow and ice.

I conclude that it is quite within the realm of reasonableness for a jury upon consideration of the evidence, to conclude that the pathway to the garbage can and the area immediately around it were not fit for their intended use.

Reaching this conclusion does not mean that that plaintiff is entitled to a judgment against the defendant; only that under the law established by the legislature she is entitled to her day in court and to have this factual question determined by a fact-finder.

/s/ Douglas B. Shapiro