

STATE OF MICHIGAN  
IN THE SUPREME COURT

IRVING ALLISON,  
Plaintiff-Appellee,

vs.

AEW MANAGEMENT, LLP  
d/b/a SUTTON PLACE APARTMENTS,

Defendants,

and

VILLAGE GREEN MANAGEMENT CO.,  
and BFMSIT, II,

Defendants-Appellants.

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Docket No: 133771  
Court of Appeals Docket No: 269021  
Oakland County Circuit Court  
Hon. Gene Schnelz  
LC Case No: 05-063-356-NO

**BRIEF ON APPEAL OF PLAINTIFF-APPELLEE**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 1

INDEX OF AUTHORITIES ..... 5

STATEMENT OF QUESTIONS PRESENTED..... 9

INTRODUCTION AND SUMMARY OF ARGUMENT.....10

COUNTERSTATEMENT OF FACTS.....12

ARGUMENT I

    THE COURT OF APPEALS DID NOT VIOLATE MCR 7.215(J)(1) BECAUSE  
    THE LANGUAGE REGARDING MCL 554.139 IN *TEUFEL v WATKINS* WAS  
    NOT BINDING PRECEDENT.....16

        (a) A Court of Appeals panel is only required to follow an established rule of law..... 16

            i. MCR 7.215(J)(1) applies only to “the rule of law” that was “established”  
            in a prior published decision..... 16

            ii. MCR 7.215(J)(1) does not require a later panel to follow dicta in an earlier  
            opinion..... 17

        (b) Footnote 1 of *Teufel* was dicta.....18

            i. The allusion to MCL 554.139 was not necessary for the panel’s decision. .... 18

            ii. The fact that the authoring judge in *Teufel* placed the statement about  
            MCL 554.139 in a footnote is an indication that the court considered it to  
            be dicta..... 19

        (c) Alternatively, the *Allison II* panel correctly observed that the *Teufel* opinion  
        itself failed to comply with MCR 7.215(J)(1) by ignoring the rule of law  
        established a prior published decision.....20

            i. By the time *Teufel* was decided, this Court had established that the  
            statutory duty to maintain rented premises overrides an “open and  
            obvious” defense..... 20

            ii. The Court of Appeals had also held that the duty under the landlord-tenant  
            law will defeat a defense based on the “obviousness” of a defect in the  
            premises..... 22

            iii. *O’Donnell* was on point with the real issue in *Teufel*’s footnote 1..... 24

            iv. The *Teufel* panel should not have ignored *O’Donnell*. .... 25

            v. The *Teufel* opinion should not have addressed an issue not considered by  
            the trial court..... 26

            vi. The *Allison II* panel’s determination that the footnote in *Teufel* was not  
            binding precedent was correct..... 26

ARGUMENT II

SIDEWALKS AND PARKING LOTS IN LEASED RESIDENTIAL PREMISES ARE “COMMON AREAS” UNDER MCL 554.139(1)(a).....28

(a) Parking lots are part of the “common area” of residential property. ....28

    i. The definition of “common area” includes areas outside the walls of the building..... 28

    ii. The Court of Appeals has held that a parking lot is part of the “common area” of a leased building. .... 29

    iii. A lessor has “control” of parking areas..... 30

(b) “Residential premises” include the entire area occupied by an apartment complex. ....32

    i. “Residential” premises extend beyond “buildings and structures.”..... 32

    ii. The general rule is that a landlord is responsible for areas outside the walls of the building. .... 32

    iii. The requirements of MCL 554.139 are not confined solely to that portion of the “premises” in which a tenant “resides.” ..... 33

ARGUMENT III

A LESSOR’S DUTY UNDER MCL 554.139(1)(a) AND MCL 554.139(1)(b) INCLUDES TAKING REASONABLE MEASURES TO CORRECT THE HAZARDS POSED BY SNOW AND ICE.....35

(a) Under an appropriate construction of MCL 554.139(1)(b), a landlord’s duty to keep “the premises” in reasonable repair extends to sidewalks and parking lots.....35

    i. 554.139 was a remedial statute. .... 35

    ii. Remedial statutes must be liberally construed..... 36

    iii. A liberal construction of MCL 554.139 requires applying it to parking lots and sidewalks. .... 37

    iv. An icy parking lot is not “in reasonable repair.” ..... 37

(b) The lessor’s covenant that “all common areas are fit for the use intended by the parties” encompasses undertaking “reasonable measures within a reasonable time” to “diminish the hazards” posed by snow and ice.....38

    i. The lessor’s guarantee that the common areas “are fit for the use intended by the parties” should not depend on when the lease was signed..... 38

    ii. Walking to or from a parked vehicle is an intended use of a parking lot..... 39

    iii. A lessor of residential property is held to the same standard as any other landowner who profits from the presence of invitees..... 40

RELIEF REQUESTED .....42

## INDEX OF AUTHORITIES

### Cases

<i>Allison v AEW Capital Management, LLP (On Reconsideration)</i> , 274 Mich App 663; 736 NW2d 307 (2007).....	6, 18, 19, 33
<i>Allison v AEW Management, Inc</i> , unpublished opinion per curiam of the Court of Appeals, issued 11/28/06 (Docket No. 269021) .....	5
<i>Annis v Britton</i> , 232 Mich 291; 205 NW 128 (1925).....	28
<i>Barnes v Stanley</i> , unpublished opinion per curiam of the Court of Appeals, issued 3/18/03 (Docket No. 237291) .....	15
<i>Benton v Dart Properties, Properties</i> , 270 Mich App 437; 715 NW2d 335 (2006).....	5, 6, 22, 32
<i>Birchwood Manor, Inc v Com'r of Revenue</i> , 673 NW2d 438 (2003).....	17
<i>Birznieks v Cooper</i> , 405 Mich 319; 275 NW2d 221 (1979).....	29, 30
<i>Bryant v Brannen</i> , 180 Mich App 87; 446 NW2d 847 (1989) .....	22
<i>Burgett v Lewis</i> , unpublished opinion per curiam of the Court of Appeals, issued 4/15/03 (Docket No. 235729) .....	14
<i>Cabrera v Ekema</i> , 265 Mich App 402; 695 NW2d 78 (2005) .....	18
<i>Clark v Huckleberry</i> , unpublished opinion per curiam of the Court of Appeals, issued 9/3/02 (Docket No. 231929) .....	14
<i>Commerce Properties, Inc v Linthicum</i> , 434 SE2d 769, 771 (Ga Ct App, 1993).....	25
<i>Conerly v Liptzen</i> , 41 Mich App 238; 199 NW2d 833 (1972) .....	22
<i>Cornell v ERP Operating Ltd Partnership</i> , unpublished opinion per curiam of the Court of Appeals, issued 9/19/06 (Docket No. 269331) .....	22
<i>Derbabian v S &amp; C Snowplowing, Inc</i> , 249 Mich App 695; 644 NW2d 779 (2002) .....	17
<i>Dessart v Burak</i> , 252 Mich App 490; 652 NW2d 669 (2002).....	10, 11
<i>Dunn v Detroit Automobile Inter-Insurance Exchange</i> , 254 Mich App 256; 657 NW2d 153 (2002).....	17
<i>English v Blue Cross Blue Shield of Michigan</i> , 263 Mich App 449; 688 NW2d 523 (2004).....	9
<i>Erickson v Wasatch Manor, Inc</i> , 802 P2d 1323 (Utah Ct App, 1990).....	25
<i>Forcelli v Princeton Enterprises, LLC</i> , unpublished opinion per curiam of the Court of Appeals, issued 5/12/05 (Docket No. 251305) .....	15
<i>Fraley v Christian</i> , unpublished opinion per curiam of the Court of Appeals, issued 5/29/98 (Docket No. 199181) .....	14

<i>Herr v Moses</i> , unpublished opinion per curiam of the Court of Appeals, issued 2/10/04 (Docket No. 242936) .....	16
<i>In re KH</i> , 469 Mich 621; 677 NW2d 800 (2004).....	8
<i>Jones v Enertel, Inc</i> , 467 Mich 266; 650 NW2d 334 (2002).....	14
<i>Joyce v Rubin</i> , 249 Mich App 231; 642 NW2d 360 (2002).....	32
<i>Kremer v Carr’s Food Center, Inc</i> , 462 P2d 747 (Alas, 1969).....	30
<i>Lakeview Associates, Ltd v Maes</i> , 907 P2d 580 (Colo, 1995).....	25
<i>Lian v Stalick</i> , 25 P3d 467 (Wash Ct App, 2001).....	27
<i>Lugo v Ameritech Corp</i> , 464 Mich 512; 629 NW2d 384 (2001).....	12, 32, 33
<i>M &amp; D, Inc v McConkey</i> , 226 Mich App 801; 573 NW2d 281 (1998).....	17
<i>Madison v Wirtz</i> , 373 Mich 153; 128 NW2d 488 (1964).....	22
<i>McNeil v Charlevoix Co</i> , 275 Mich App 686; 741 NW2d 27 (2007).....	9
<i>Michigan Restaurant Ass’n v Marquette</i> , 245 Mich App 63; 626 NW2d 418 (2001) .....	9
<i>O’Donnell v Garasic</i> , 259 Mich App 569; 676 NW2d 213 (2003) .....	passim
<i>People v Gould</i> , 237 Mich 156; 211 NW 346 (1926).....	29
<i>People v Higuera</i> , 244 Mich App 429; 625 NW2d 444 (2001).....	10
<i>People v Nunez</i> , 242 Mich App 610; 619 NW2d 550 (2000).....	17
<i>People v Petit</i> , 466 Mich 624; 648 NW2d 193 (2002).....	8
<i>People v Sarnoff</i> , 302 Mich 266; 4 NW2d 544 (1942) .....	29
<i>Petraszewsky v Keeth</i> , 201 Mich App 535; 506 NW2d 890 (1993).....	22
<i>Pierce v City of Lansing</i> , 265 Mich App 174; 694 NW2d 65 (2005).....	15
<i>Quinlivan v Great Atlantic &amp; Pacific Tea Co, Inc</i> , 395 Mich 244; 235 NW2d 732 (1975).....	30, 32, 33
<i>Ransburg v Richards</i> , 770 NE2d 393 (Ind Ct App, 2002) .....	25
<i>Rincones v Kramer</i> , unpublished opinion per curiam of the Court of Appeals, issued 2/23/06 (Docket No. 256706) .....	16
<i>Rome v Walker</i> , 38 Mich App 458; 196 NW2d 850 (1972).....	27
<i>Ross v Blue Care Network of Michigan</i> , 271 Mich App 358; 722 NW2d 223 (2006) .....	9, 10
<i>Royce v Chatwell Club Apartments</i> , 276 Mich App 389; 740 NW2d 547 (2007).....	16
<i>Samson v Saginaw Professional Bldg, Inc</i> , 393 Mich 393; 224 NW2d 843 (1975).....	22
<i>Shackett v Schwartz</i> , 77 Mich App 518; 258 NW2d 543 (1977).....	21
<i>Shallal v Catholic Social Services of Wayne County</i> , 455 Mich 604; 566 NW2d 571 (1997).....	28
<i>Smith v Grove Apartments, LLC</i> , ___ So2d ___ (Fla Dist Ct App, 2007) .....	25

<i>Soap &amp; Detergent Ass'n v Natural Resources Comm</i> , 415 Mich 728; 330 NW2d 346 (1982).....	28
<i>Stanley v Town Square Co-op</i> , 203 Mich App 143; 512 NW2d 51 (1993).....	21, 22
<i>Teufel v Watkins</i> , 267 Mich App 425; 705 NW2d 164 (2005).....	passim
<i>Village Green of Lansing v Board of Water and Light</i> , 145 Mich App 379; 377 NW2d 401 (1985).....	21
<i>Washtenaw Co Health Dep't v T &amp; M Chevrolet, Inc</i> , 406 Mich 518; 280 NW2d 822 (1979).....	18
<i>Woodbury v Bruckner (On Remand)</i> , 248 Mich App 684; 650 NW2d 343 (2001).....	13
<i>Woodbury v Bruckner</i> , 464 Mich 875; 629 NW2d 401 (2001).....	13
<i>Woodbury v Bruckner</i> , 467 Mich 922; 658 NW2d 482 (2002).....	14
<i>Zebold v Christopher Investments</i> , unpublished opinion per curiam of the Court of Appeals, issued 9/1/00 (Docket No. 214577).....	15

**Statutes**

1917 PA 167, § 71.....	27
1929 CL § 2559.....	27, 29
1968 PA 295 .....	28
MCL 333.5451 <i>et seq.</i> .....	20
MCL 333.5455 .....	20
MCL 333.5455(3) .....	21
MCL 339.2401(c).....	24
MCL 554.139.....	passim
MCL 554.139(1) .....	2, 20, 25, 33
MCL 554.139(1)(a).....	passim
MCL 554.139(1)(b).....	1, 2, 5, 6
MCL 554.139(3) .....	7, 20, 32

**Rules**

MCR 7.215(J) .....	18
<b>MCR 7.215(J)(1)</b> .....	passim

**Treatises**

Am Jur Landlord and Tenant, § 447 ..... 27  
CJS, Landlord & Tenant, §897 ..... 25  
Enlich, Interpretation of Statutes..... 29  
Harper, James & Gray, The Law of Torts (3<sup>rd</sup> ed)..... 27  
Restatement Torts, 2d § 360 ..... 25  
Sands, Sutherland Statutory Construction (4th ed)..... 28  
Sutherland, Statutory Construction ..... 29

**Other Authorities**

Black’s Law Dictionary (7<sup>th</sup> ed)..... 11, 20, 24, 26  
<http://dictionary.law.com/> ..... 23  
<http://dictionary.reference.com/> ..... 23  
Prospectus ..... 28  
[www.m-w.com](http://www.m-w.com).....12, 23

## STATEMENT OF QUESTIONS PRESENTED

### I.

**DID THE COURT OF APPEALS VIOLATE MCR 7.215(J)(1) WHEN THE LANGUAGE REGARDING MCL 554.139 IN TEUFEL v WATKINS WAS NOT BINDING PRECEDENT?**

Plaintiff-Appellee Irving Allison answers "NO."

Defendant-Appellant Village Green Management Company would answer "YES."

The Court of Appeals answered "NO."

This question was not before the trial court.

### II.

**ARE SIDEWALKS AND PARKING LOTS IN LEASED RESIDENTIAL PREMISES "COMMON AREAS" UNDER MCL 554.139(1)(a)?**

Plaintiff-Appellee Irving Allison answers "YES."

Defendant-Appellant Village Green Management Company would answer "NO."

The Court of Appeals answered "YES."

The trial court answered "NO."

### III.

**DOES A LESSOR'S DUTY UNDER MCL 554.139(1)(a) AND MCL 554.139(1)(b) INCLUDE TAKING REASONABLE MEASURES TO CORRECT THE HAZARDS POSED BY SNOW AND ICE?**

Plaintiff-Appellee Irving Allison answers "YES."

Defendant-Appellant Village Green Management Company would answer "NO."

The Court of Appeals answered "YES."

The trial court answered "NO."

## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff slipped and fell on ice-covered snow in the parking lot of his apartment complex. He sued defendant, alleging violation of MCL 554.139(1)(a), requiring a lessor of residential property to warrant that the premises and common areas are “fit for the use intended,” and MCL 554.139(1)(b), which mandates that the landlord “keep the premises in reasonable repair.” The trial court dismissed the claim, finding that the ice was “open and obvious.” Plaintiff appealed.

The Court of Appeals initially affirmed the trial court, finding that it was required to apply language from *Teufel v Watkins, infra*, that “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.” On reconsideration, however, the Court of Appeals reversed its decision and held that the cited language was not binding precedent under MCR 7.215(J)(1). The panel also determined that “a parking lot . . . constitutes a common area under MCL 554.139(1)(a) and that defendant had a duty to keep the parking lot free from ice.” This Court granted defendant’s application for leave to appeal, directing the parties to address both the substantive issue of defendant’s duty and the question whether the Court of Appeals failed to comply with the “first-out” rule in MCR 7.215(J)(1).

The Court of Appeals did not violate MCR 7.215(J)(1). The rule requires a Court of Appeals panel to follow “the rule of law established” in a prior published opinion. The language on which defendant relied was not a “rule of law.” Rather, it was dicta, inserted in a footnote to the *Teufel* opinion after the decision had been reached. Alternatively, the *Teufel* panel itself violated the rule, when it ignored both binding precedent from this Court and a prior on-point decision from the Court of Appeals. The Court of Appeals, then, did not err when it did not apply the language from *Teufel*’s footnote 1.

MCL 554.139(1)(a)’s reference to “the premises and all common areas” includes sidewalks and parking lots. To the extent that the Legislature has defined “common area,” it has not confined that definition to the inside of an apartment building. The Michigan Court of

Appeals has, consistent with the majority view of courts in the United States, held that parking lots are part of the “common areas” of residential properties. The concept of “premises,” too, extends to portions of the property beyond the physical structure of a building.

The duty of an invitor to an invitee with respect to ice and snow has long been to take “reasonable measures within a reasonable time.” An appropriate analysis of MCL 554.139(1) would simply restore the duty of a residential lessor to that standard. MCL 554.139 was a remedial statute, designed to counter the harshness of the common law. Both general rules of construction and the specific directive of MCL 554.139(3) require that the statute be applied expansively rather than restrictively. The statute, therefore, should be read to mean that the landlord’s guarantee that the premises are “fit for their intended use” includes taking reasonable measures to remove ice and snow. Walking is one of the “intended uses” of a parking lot and an ice-covered parking lot is not “fit” for its purposes, as required by MCL 554.139(1)(a). The same may be said of the duty to “keep the premises in repair” in MCL 554.139(1)(b), i.e., that a liberal construction includes reasonable maintenance of the parking lot.

This Court should affirm the Court of Appeals.

## COUNTERSTATEMENT OF FACTS

### Underlying facts

This matter arises out of a slip-and-fall accident that occurred on March 13, 2003. The facts were not significantly disputed.

Plaintiff lived in an apartment on Riverside Drive in Southfield. (Deposition of Irving Allison, p 4; Appendix, p 28a.) On March 12, 2003, he got home after dark. (Allison deposition, p 37; Appendix, p 36a.) He went to bed without looking out the window. (Allison deposition, p 38; Appendix, p 37a.)

He woke up the next morning, March 13, at approximately 5:30 a.m. (Allison deposition, p 38; Appendix, p 37a.) At 6:00 or 6:45, he saw “about an inch or two” of snow on the ground. (Allison deposition, p 42; Appendix, p 38a.)

The sidewalks were covered with snow and there was snow on the porch of the building. (Allison deposition, pp 43, 44; Appendix, p 38a.) Plaintiff walked across the porch and down two steps to the sidewalk. (Allison deposition, pp 44-45; Appendix, p 38a.) He was wearing ankle boots, designed for snow. (Allison deposition, p 46; Appendix, p 39a.)

The entire parking lot was covered with snow. (Allison deposition, p 51 Appendix, p 40.) He had to walk over the snow to get to his car. (Allison deposition, p 51; Appendix, p 40.)

About 20 feet from the building, he fell. (Allison deposition, pp 45-46; Appendix, pp 38a-39a.) He fell on ice under the snow. “It was ice that I slipped on.” (Allison deposition, p 46; Appendix, p 39a.) “[M]y leg just went from under me and then when I fell, I saw where my foot slipped, I saw ice.” (Allison deposition, pp 46-47; Appendix, p 39a.)

I know it’s icy because of the shine that it gives off. I know it’s ice because it’s sort of opaque like. I mean ice is – you can kind of see through ice. It’s transparent. [Allison deposition, p 47; Appendix, p 39a.]

The ice was covered with snow. (Allison deposition, p 48; Appendix, p 39a.)

Plaintiff was looking at the ground before he slipped. (Allison deposition, p 47; Appendix, p 39a.) “I was focusing on how I was walking, where I was walking.” (Allison deposition, p 48; Appendix, p 39a.)

As a result of the fall, plaintiff broke his left ankle. (Allison deposition, p 22; Defendant's Appendix, p 32a.) He had surgery to reduce the fracture, followed by physical therapy. (Allison deposition, pp 20-24; Appendix, pp 32a-33a.) He still experiences pain from the injury. (Allison deposition, pp 25, 26-29; Appendix, pp 33a-34a.)

#### Procedural history

Plaintiff filed suit in the Oakland Circuit Court on January 4, 2005. His complaint alleged breach of the warrant of habitability in MCL 554.139. (Complaint, ¶¶ 16-19; Appendix, pp 9a-10a.)

Defendant moved for summary disposition, arguing that “plaintiff's claims that are based in the common law are barred by the open and obvious doctrine” and “plaintiff cannot avail himself of the protection of MCLA § 554.139, Michigan’s landlord-tenant statute, because the Court of Appeals has published a decision and, albeit in a footnote, has indicated that the statute does not apply to accumulations of ice and snow.” (Defendant's motion for summary disposition; Appendix, p 14a.)

At the hearing on defendant's motion, the Hon. Gene Schnelz read a prepared opinion in which he granted defendant's motion. (Appendix, p 53a.) “I would suggest that it was open and obvious, and given the status of the law in the state of Michigan, this is not going to fly.” (Appendix, p 53a.)

An order was entered on February 21, 2006. (Appendix, pp 55a-56a.) The order also revised the caption, to reflect the correct name of the defendant.

#### The Court of Appeals opinions

Plaintiff appealed to the Court of Appeals, which initially affirmed the trial court’s decision. (Appendix, pp 57a-59a.) Although the panel (Judges Borrello, Jansen and Cooper)

disagreed with the decision of an earlier panel of the Court of Appeals in *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005), the panel stated that “we must follow it as binding precedent.” *Allison v AEW Management, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 11/28/06 (Docket No. 269021) (“*Allison I*”).

Plaintiff filed a timely motion for reconsideration. Plaintiff argued:

The panel in *Teufel* did not, as suggested by this Court, create or intend to create a new rule of law that snow and ice removal is not a duty encompassed by MCL 554.139. The panel in *Teufel* held that snow and ice do not constitute “defects in the premises,” thus the duty to repair set forth in MCL 554.139(1)(b) is not triggered. However, the panel completely failed to address whether snow and ice removal is encompassed by the duties set forth in MCL 554.139(1)(a), that is the duty to keep the common areas fit for intended use. Since the plaintiff in this case alleged, and supported with admissible evidence, that the defendant’s failure to remove snow and ice from the parking lot constituted a breach of MCL 554.139(1)(a) in that the parking lot was not fit for pedestrian passage, and the Court in *Benton [v Dart Properties, Properties]*, 270 Mich App 437; 715 NW2d 335 (2006) held that the open and obvious doctrine was not applicable in that exact scenario, *Teufel* was not even implicated [Plaintiff’s motion for reconsideration, p 5; Appendix, p 8b.]

In an order dated January 19, 2007, the Court of Appeals granted plaintiff’s motion for reconsideration and vacated its November 28, 2006 opinion.<sup>1</sup> On March 15, 2007, the Court of Appeals issued a new opinion, reversing the trial court’s order of summary disposition. *Allison v AEW Capital Management, LLP (On Reconsideration)*, 274 Mich App 663; 736 NW2d 307 (2007) (“*Allison II*”).

In its second opinion, the panel criticized the *Teufel* opinion, for two reasons. The first was that the *Teufel* panel did not “attempt to distinguish or even mention . . . *O’Donnell [v Garasic, infra]*, which specifically held that a defendant cannot use the open and obvious danger doctrine to avoid liability when the defendant has statutory duties to maintain the premises under MCL 554.139(1)(a) and (b) . . .” 274 Mich App 668. The second was that *Teufel* “combined the duties imposed by MCL 554.139(1)(a) and MCL 554.139(1)(b) in rendering its

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<sup>1</sup> The panel also declared a conflict with *Teufel*, but the Court of Appeals declined to convene a conflict panel.

conclusion, with very little analysis of MCL 554.139(1)(b) and no analysis of MCL 554.139(1)(a).” 274 Mich App 669.

The *Allison II* panel conceded that it would be required to follow *Teufel* anyway, but determined that the decision was not binding. “Had our Court in *Teufel* intended to create a rule of law regarding the availability of the open and obvious danger doctrine when a landlord has statutory duties under MCL 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote.” 274 Mich App 669-670. The court then went on to hold that the lessor’s duty to maintain the common area encompassed the parking lot:

*Teufel* did not analyze whether a parking lot is a common area under MCL 554.139(1)(a) and therefore did not determine whether a landlord had a duty to keep it fit for the use intended, but *Benton* did analyze whether a sidewalk was a common area under the statute. Like the Court in *Benton*, we conclude that *the parking lot in the instant case was a common area under MCL 554.139(1)(a)*. The parking lot, like the sidewalk in *Benton*, is located within the parameters of the apartment complex and must be maintained by the landlord or someone in the landlord's employ. In addition, tenants also must necessarily walk on the parking lot to get to their vehicles from their apartments and to get to their apartments from their vehicles. The intended use of a parking lot is to park cars and other motor vehicles; however, in order to access their vehicles and apartments, tenants must also necessarily walk on the parking lot. *A second intended use of a parking lot, therefore, is walking on it. A parking lot covered with ice is not fit for this purpose. . . . [W]e are mindful that the provisions of MCL 554.139 "shall be liberally construed...." MCL 554.139(3). We therefore conclude that a parking lot, like a sidewalk, constitutes a common area under MCL 554.139(1)(a) and that defendant had a duty to keep the parking lot free from ice. [274 Mich App 670-671. Emphasis supplied.]*

Defendant applied for leave to appeal. On September 26, 2007, this Court granted the application in an order directing the parties to brief three issues:

(1) whether the Court of Appeals violated MCR 7.215(J)(1) by not following the precedent of *Teufel v Watkins*, 267 Mich App 425, 429 n 1 (2005); (2) whether sidewalks and parking lots in leased residential areas are “common areas” under MCL 554.139(1)(a); and (3) whether natural accumulation of snow and ice is subject to the lessor’s duty established in MCL 554.139(1)(a) and (b). [\_\_\_ Mich \_\_\_; 738 NW2d 757 (2007).]

## ARGUMENT I

### THE COURT OF APPEALS DID NOT VIOLATE MCR 7.215(J)(1) BECAUSE THE LANGUAGE REGARDING MCL 554.139 IN *TEUFEL v WATKINS* WAS NOT BINDING PRECEDENT.

#### Standard of review

“[T]he interpretation of a court rule . . . like a matter of statutory interpretation, is a question of law that we review de novo.” *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

#### (a)

#### A Court of Appeals panel is only required to follow an established rule of law.

- i. MCR 7.215(J)(1) applies only to “the rule of law” that was “established” in a prior published decision.*

MCR 7.215(J)(1) provides:

A panel of the Court of Appeals must follow *the rule of law established* by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule. [Emphasis supplied.]

As this Court has stated on many occasions:

When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. [*In re KH*, 469 Mich 621, 627; 677 NW2d 800 (2004). Citations omitted.]

The plain language of MCR 7.215(J)(1) is that what panels of the Court of Appeals are required to follow from “a prior published decision” is “the rule of law” that was “established” in it. Anything other than “the rule of law,” then, is not binding on a later panel, nor is a purported “rule of law” that was not “established” in an opinion.

ii. ***MCR 7.215(J)(1) does not require a later panel to follow dicta in an earlier opinion.***

The fact that language appears in “a prior published decision of the Court of Appeals issued on or after November 1, 1990” does not mean that it is necessarily “[a] rule of law” that was “established” by the decision.

Indeed, in a recent opinion, the Court of Appeals explicitly held that MCR 7.215(J)(1) did not apply to dicta. *McNeil v Charlevoix Co*, 275 Mich App 686; 741 NW2d 27 (2007) was a declaratory judgment action challenging a regulation of smoking in places of employment. The trial court found the regulation enforceable and the plaintiffs appealed. The plaintiffs pointed to a sentence in a prior opinion, *Michigan Restaurant Ass'n v Marquette*, 245 Mich App 63, 67; 626 NW2d 418 (2001), where the panel stated “[s]moking is a statewide issue that is not local in character . . .”

The *McNeil* panel found that the language in *Marquette* was not binding. “[W]e agree with defendants that *the majority's statement that '[s]moking is a statewide issue that is not local in character' is merely dictum and, therefore, does not constitute binding precedent under MCR 7.215(J)(1).*” 275 Mich App \_\_\_, 741 NW2d 36 (emphasis supplied). The panel also noted that another part of the *Marquette* opinion “was unnecessary” and so constituted dicta as well. *Id.*

*Ross v Blue Care Network of Michigan*, 271 Mich App 358; 722 NW2d 223 (2006) presented a similar situation. The petitioner challenged a coverage decision by the defendant with the Office of Financial and Insurance Services (OFIS) on the basis that her husband’s out-of-network medical care constituted an “emergency” that the respondent should pay for. OFIS found in her favor and the insurer appealed to circuit court. The circuit court reversed the OFIS decision and the petitioner appealed. The Court of Appeals reversed in part. The insurer relied on *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449; 688 NW2d 523 (2004) where “this Court stated that the [independent review officer]’s recommendation ‘is not binding’

on the OFIS Commissioner.” 271 Mich App 372. The Court of Appeals determined that the language was dicta.

The *English* panel's statement . . . is not a "rule of law." . . . The *English* panel was never actually presented with the question whether an IRO's recommendation is binding on the OFIS Commissioner. . . . [T]he language at issue was not essential to the resolution of a question that was actually presented to the Court; thus, it "lack[s] the force of an adjudication." . . . Therefore, the *English* panel's wording concerning the absence of deference owed to an IRO recommendation does not constitute a "rule of law" within the meaning of MCR 7.215(J)(1), and this Court is not bound by that language. [271 Mich App 374-375. Emphasis supplied.]

When a panel of the Court of Appeals makes a statement that is “not essential to the resolution of a question that was actually presented,” then, that portion of the opinion is not “[a] rule of law established by a prior published decision” and so not binding under MCR 7.215(J)(1).

(b)

**Footnote 1 of *Teufel* was dicta.**

*i. The allusion to MCL 554.139 was not necessary for the panel’s decision.*

“Black's Law Dictionary defines obiter dictum as '[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).’” *Dessart v Burak*, 252 Mich App 490, 496, n 5; 652 NW2d 669 (2002), aff'd 470 Mich 37; 678 NW2d 615 (2004), quoting *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001).

In *Teufel v Watkins*, *supra*, the plaintiff “slipped and fell on ice in the parking lot of his apartment complex.” 267 Mich App 426. The trial court granted the defendant's motion for summary disposition, on the basis that the ice was “open and obvious.” The Court of Appeals affirmed, stating that the plaintiff could have parked his car somewhere else and avoided the snow pile that caused his injury. 267 Mich App 429.

[T]he evidence demonstrates that a reasonably prudent person with ordinary intelligence would have anticipated that ice and snow would be present at the bottom of a snowbank and would have been able to perceive and foresee the danger of the ice on the other side of the snow pile. For these reasons, the trial

court did not err by finding that the condition encountered by plaintiff was open and obvious. [267 Mich App 428]

The body of the opinion did not say anything about the defendant's duty under the habitability statute. Rather, in a footnote, the Court of Appeals raised an issue that had not been ruled on by the trial court:

Plaintiff also argues that the trial court erred when it failed to address his argument that Springs 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. [267 Mich App 429, n 1.]

Defendant asserts that "[t]he footnote addressed a question that was directly involved in the appeal and that was critical to the decision." (Defendant's' brief, p 16.) This analysis is almost the inverse of an accurate description of the situation.

By the point in the opinion where footnote 1 was inserted, the court had already rendered its decision. It affirmed the trial court, based entirely on the "obviousness" of the hazard. 267 Mich App 428. The panel also dismissed the plaintiff's "special aspects" argument. *Id.* at 429. Footnote 1, then, was an afterthought. Its reasoning was an aside, not a part of the court's opinion. It was, therefore, "not precedential." *Dessart, supra*.

*Teufel's* footnote 1 is a classic example of dicta: "a judicial comment . . . unnecessary to the decision in the case . . ." Black's, *supra*.

***ii. The fact that the authoring judge in Teufel placed the statement about MCL 554.139 in a footnote is an indication that the court considered it to be dicta.***

A footnote is "a note of reference, explanation, or comment usually placed below the text on a printed page." [www.m-w.com](http://www.m-w.com). A related meaning is "a relatively

subordinate or minor part (as of an event, work, or field).” *Id.* In other words, a “footnote” is something that the author of a text treats as “a minor part” of the corpus.

The history of *Teufel*’s footnote one is another indication of its relatively insignificant position in the opinion. The last sentence of the footnote was omitted from the court’s opinion when it was submitted for publication. It was restored only after an express request from the attorney for one of the defendants:

For Party: 2 WATKINS OLIE DF-AE  
Attorney: 61978 - CAVANAGH MEGAN K  
*Comments:* Request COA To Reinsert Last Sentence of Fn1 That Was Omitted During Editing Process [Court of Appeals docket entry 11/07/2005]

*Comments:* Chf Clk Advised Parties Last Sentence of Fn 1 Will Appear in the Mich App Reports [Court of Appeals docket entry 11/08/2005.]

The location of the panel’s statement about the plaintiff’s statutory duty argument is a second clue that the language defendant relies on was not “necessary to the decision of the case.”

(c)

**Alternatively, the *Allison II* panel correctly observed that the *Teufel* opinion itself failed to comply with MCR 7.215(J)(1) by ignoring the rule of law established a prior published decision.**

*i. By the time Teufel was decided, this Court had established that the statutory duty to maintain rented premises overrides an “open and obvious” defense.*

In *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), this Court held that “a premises possessor is not required to protect an invitee from open and obvious dangers . . .” 463 Mich 517. That principle, however, has been limited where the landowner was under a statutory duty to maintain or repair the premises.

*Woodbury v Bruckner (On Remand)*, 248 Mich App 684; 650 NW2d 343 (2001) has a lengthy but instructive appellate history. The plaintiff lived in a second story apartment. A small deck extended outside her front door; it was “over nine feet from the ground” but had no railing.

The plaintiff used it as a balcony and also viewed it as a fire escape. One night, as she was shaking out a rug, she lost her balance and fell. She sued the landlords. The trial court granted the defendant's motion for summary disposition on the basis that the danger of an unguarded balcony was "open and obvious." The Court of Appeals initially reversed in an unpublished opinion, concluding that "a genuine issue of fact exists as to whether the risk of plaintiff's falling from the roof remained unreasonable." This Court vacated that opinion and remanded for consideration of several issues, including "(1) whether the covenant imposed by MCL 554.139 gave rise to a duty in tort. . . [and] (2) if so, whether defendants can avoid tort liability arising from MCL 554.139 by relying on the open and obvious doctrine." *Woodbury v Bruckner*, 464 Mich 875; 629 NW2d 401 (2001). On remand, the Court of Appeals held a statutory duty to maintain leased residential premises was "irrelevant."

In regard to the present landlord-tenant relationship, our Supreme Court in [*Mobil Oil Corp v Thorn*, 401 Mich 306, 311-312; 258 NW2d 30 (1977)], held that a duty in tort exists. Further, defendants concede the existence of a duty to plaintiff. Accordingly, whether an independent duty in tort also arises by operation of MCL 554.139 is irrelevant. Instead, our common-law rules and any applicable statutory provisions are important in determining the scope of defendant's duty, not its existence. [248 Mich App 696. Footnote omitted.]

The defendant applied for leave to appeal. This Court again remanded the case, while retaining jurisdiction, to permit the panel to remand the case to the trial court "for resolution of any factual dispute regarding the applicability of MCL 554.139(1)(b)" because "*[the open and obvious doctrine cannot be used to avoid a specific statutory duty.]*" *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002) (emphasis supplied).

The Court of Appeals remanded the case to the circuit court, leading this Court to release its jurisdiction. 666 NW2d 685 (2003). The defendant moved for reconsideration of that order, which was denied. 469 Mich 983; 672 NW2d 849 (2003). Thus, the principle that the "open and

obvious doctrine cannot be used to avoid a specific statutory duty,” 467 Mich 922, became an established part of Michigan’s tort law.<sup>2</sup>

*Teufel* was decided on May 10, 2005. By the time of that decision, then, the 2003 rule in *Woodbury* was final. The Court of Appeals should have acknowledged that where there is a statutory duty to keep the premises in repair, the fact that a hazardous condition was “open and obvious” will not absolve the landowner of liability.

***ii. The Court of Appeals had also held that the duty under the landlord-tenant law will defeat a defense based on the “obviousness” of a defect in the premises.***

Even before the *Woodbury* decisions, the Court of Appeals had reached the same result, i.e., that the “open and obvious” doctrine is not a defense to a violation of MCL 554.139, in other cases. See *Clark v Huckleberry*, unpublished opinion per curiam of the Court of Appeals, issued 9/3/02 (Docket No. 231929) (broken pane of glass in a swinging door); *Fraley v Christian*, unpublished opinion per curiam of the Court of Appeals, issued 5/29/98 (Docket No. 199181) (plaintiff tripped on loose carpeting on the stairwell; open and obvious not a defense); *Burgett v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued 4/15/03 (Docket No. 235729) (plaintiff fell on front steps of leased house; plaintiff testified that defendant failed to provide him with the materials necessary to repair the steps and to install an eaves trough that would have diverted damaging water from the steps); *Zebold v Christopher Investments*, unpublished opinion per curiam of the Court of Appeals, issued 9/1/00 (Docket No. 214577) (defendants required to repair asphalt driveway in mobile home park).

The Court of Appeals’ first published post-*Woodbury* case examining the effect of MCL 554.139 was *O’Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003). The plaintiff was the tenant in a rented cottage. She fell off a small unguarded landing. The defendant argued

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<sup>2</sup> This Court made an analogous ruling in *Jones v Enertel, Inc*, 467 Mich 266, 268-269; 650 NW2d 334 (2002), holding that the open and obvious doctrine of common-law premises liability

that the defect was “obvious,” even though the accident occurred at night. The Court of Appeals held that the defendant was not entitled to summary disposition of the claim. “The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b).” 259 Mich App 581.

The Court of Appeals subsequently decided a number of similar cases. See *Pierce v City of Lansing*, 265 Mich App 174, 184; 694 NW2d 65 (2005) (open and obvious doctrine does not apply to claims brought under the public building exception to governmental immunity); *Forcelli v Princeton Enterprises, LLC*, unpublished opinion per curiam of the Court of Appeals, issued 5/12/05 (Docket No. 251305) (plaintiff tripped over an expansion joint in a ramp; remanded for determination if defendant breached statutory duty); *Barnes v Stanley*, unpublished opinion per curiam of the Court of Appeals, issued 3/18/03 (Docket No. 237291) (plaintiff fell down a stairwell with no handrails after catching her foot in a bent noser strip; open and obvious not a defense); *Rincones v Kramer*, unpublished opinion per curiam of the Court of Appeals, issued 2/23/06 (Docket No. 256706) (ice on roof formed ice formed from water dripping from a leaky roof); *Herr v Moses*, unpublished opinion per curiam of the Court of Appeals, issued 2/10/04 (Docket No. 242936) (“similar factual pattern” to *O’Donnell*); *Hysni v Cornwall Plumbing, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 2/3/04 (Docket No. 243564) (defective hot water controls in shower).

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cannot bar a claim against a municipality under the highway exception to governmental immunity.

The *O'Donnell* opinion was over a year old<sup>3</sup> by the date of the *Teufel* opinion. A multitude of other Court of Appeals panels had followed it, or applied a closely-related rule. There was no reason, therefore, that the *Teufel* panel should have ignored it.

**iii. O'Donnell was on point with the real issue in Teufel's footnote 1.**

One of the issues presented in *O'Donnell* was whether “the rented premises were unfit and not in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b).” 259 Mich App 580. The Court of Appeals considered the issue significant enough that, even though “the issue of statutory duty was neither briefed nor argued by the parties,” *id.* at 581, the panel directed “the parties and the [trial] court” “to reach the issue in accordance with applicable law.” 259 Mich App 582.

Recently, the Court of Appeals itself has held that the *O'Donnell* holding should have applied in *Teufel*. In *Royce v Chatwell Club Apartments*, 276 Mich App 389; 740 NW2d 547 (2007), a tenant slipped on “snow-covered black ice” in parking lot. The panel followed *Allison II* rather than the dicta in *Teufel*:

We find *Teufel* inapplicable for two reasons. First, *Teufel* ignored the binding precedent set forth in *O'Donnell* . . . While *O'Donnell* addressed a fall off an open stairway inside of a leased premises rather than a fall on ice or snow in an apartment complex parking lot, *the rule of law announced in that case remains applicable here.* [740 NW2d 552. Emphasis supplied.]

According to the famous footnote in *Teufel*, too, the trial court “failed to address” the 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.” 267 Mich App 425, n 1 (emphasis supplied). According to *O'Donnell*, then, the panel should have, at the least, directed the trial court to consider the issue.

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<sup>3</sup> This Court denied leave to appeal in *O'Donnell* on June 30, 2004. 470 Mich 886; 682 NW2d 90 (2004).

**iv. The Teufel panel should not have ignored O'Donnell.**

Defendant states that “the *Teufel* court did not reference *O'Donnell*” because *O'Donnell* was “markedly dissimilar from those of *Teufel*.” (Defendant’s brief, p 18.) This statement raises something of an interesting question in itself.

A Court of Appeals panel can certainly try to find that an earlier opinion is distinguishable from the later case. See, e.g., *People v Nunez*, 242 Mich App 610, 625, n 2; 619 NW2d 550 (2000) (O’Connell, J., concurring); *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 708, n 8; 644 NW2d 779 (2002); *Dunn v Detroit Automobile Inter-Insurance Exchange*, 254 Mich App 256, 261-262; 657 NW2d 153 (2002); *Birchwood Manor, Inc v Comm’r of Revenue*, 673 NW2d 438 (2003), superseded 261 Mich App 248; 680 NW2d 504 (2004); *M & D, Inc v McConkey*, 226 Mich App 801; 573 NW2d 281, 289 (1998), superseded 231 Mich App 22; 585 NW2d 33 (1998).

There is, however, no authority for the proposition that a panel can simply ignore a decision that it thinks is not on point.

Despite defendant's assertion that *Teufel* and *O'Donnell* are “markedly different,” an examination of the relevant aspects of the two cases shows that the dispositive facts of are functionally the same:

	<i>O'Donnell</i>	<i>Teufel</i>
Defendant	Owner/lessor	Owner/lessor
Defense	Open and obvious	Open and obvious
Applicable statute	MCL 554.139	MCL 554.139
Defect alleged	Unguarded balcony	Ice under snow
Property	Rental cabin	Leased

apartment

There was no reason, then, for the *Teufel* panel to have simply bypassed *O'Donnell* when it analyzed the controlling case law.

v. ***The Teufel opinion should not have addressed an issue not considered by the trial court.***

“In general, issues not preserved and ruled upon by the trial court will not be decided on appeal.” *Cabrera v Ekema*, 265 Mich App 402, 412; 695 NW2d 78 (2005).” The *Teufel* panel stated that the trial court “failed to address his argument that Springs had a statutory duty under MCL 554.139 to keep its premises and common areas in reasonable repair and fit for their intended uses.” 267 Mich App 429, n 1. The *Teufel* court, then, should never have reached the issue in the first place.

vi. ***The Allison II panel’s determination that the footnote in Teufel was not binding precedent was correct.***

This Court “will uphold an order of a lower court found to be correct although for the wrong reason.” *Washtenaw Co Health Dep’t v T & M Chevrolet, Inc*, 406 Mich 518, 520, n 1; 280 NW2d 822 (1979). Whether or not the Court of Appeals placed undue emphasis on the fact that *Teufel’s* reference to MCL 554.139 appeared in a footnote to the opinion, the *Allison II* panel did not err in declining to apply it.

Defendant maintains that “[o]nly strict adherence to MCR 7.215(J) will promote evenhanded, predictable, and consistent development of legal principles while also contributing to the integrity of the judicial process.” (Defendant’s brief, p 20.) Even “strict adherence” to the “first-out” rule, however, does not require the Court of Appeals to ignore its essence.

Maintaining “the integrity of the judicial process” requires that *all* players follow the same rules. Where one Court of Appeals skates around them, whether through inadvertence or deliberate neglect, the law is no longer “evenhanded,” “predictable” or “consistent.”

The *Allison II* panel did not violate MCR 7.215(J)(1).

## ARGUMENT II

### SIDEWALKS AND PARKING LOTS IN LEASED RESIDENTIAL PREMISES ARE “COMMON AREAS” UNDER MCL 554.139(1)(a).

#### Standard of review

See Argument I.

#### (a)

#### **Parking lots are part of the “common area” of residential property.**

- i. *The definition of “common area” includes areas outside the walls of the building.*

MCL 554.139 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 wilful or irresponsible conduct or lack of conduct. [MCL 554.139(1)(b).]

MCL 554.139(3) provides that the statute shall be “liberally construed.”

MCL 554.139(1)(a) does not define “common areas.” Black defines the term as “[t]he realty that all tenants may use though the landlord retains control and responsibility over it.”

Black’s Law Dictionary (7<sup>th</sup> ed), p 268.

The Legislature has had occasion to define the term “common area” in the context of another remedial statute, MCL 333.5455, which is part of the lead abatement act.<sup>4</sup>

"Common area" means a portion of a building that is generally accessible to all occupants of the building. Common area includes, but is not limited to, a

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<sup>4</sup> MCL 333.5451 *et seq.*

hallway, a stairway, a laundry and recreational room, a playground, a community center, a garage, and a boundary fence. [MCL 333.5455(3).]

It is apparent from this list that the Legislature, when it envisioned a “common area,” did not confine itself to the four walls of a building. “Community centers,” “garages” and “boundary fences” are obviously not within “a building.” Nonetheless, they were specifically enumerated in the one place where a law-making body had the opportunity to define “common” areas.

**ii. *The Court of Appeals has held that a parking lot is part of the “common area” of a leased building.***

In *Village Green of Lansing v Board of Water and Light*, 145 Mich App 379; 377 NW2d 401 (1985), the Court of Appeals held, “[c]ommon areas’ in multiple-family dwelling are *areas which are appurtenant to the individual dwelling units, such as* entrances, hallways, basements, laundry rooms, storage rooms, community areas, *parking lots*, and other similar areas in and adjacent to the multiple-family dwellings.” 145 Mich App 382 (emphasis supplied).

It is hardly surprising, then, that parking lots have been found to be part of the “common area” of leased premises in other cases.

In *Shackett v Schwartz*, 77 Mich App 518; 258 NW2d 543 (1977), the plaintiff was a patient who slipped and fell in the parking lot of her doctor’s office. The doctor’s lease provided that the parking area was “to be used in common with other tenants.” *Id.* at 520, 526. The plaintiff sued both the doctor and his landlord. The Court of Appeals concluded “it is clear that the parking lot was a common area not under [the tenant’s] control.” 77 Mich App 527.

In *Stanley v Town Square Co-op, supra*, the Court of Appeals clearly treated the parking lot as a “common area” of the premises. “Because a landlord exercises exclusive control over the common areas of the premises, the landlord is the only one who can take the necessary precautions to ensure that the common areas are safe for those who use them.” 203 Mich App 146.

See also *Madison v Wirtz*, 373 Mich 153, 157-158; 128 NW2d 488 (1964) (rejecting argument that “the space in front of the trailer where [the plaintiff] parked her car” was not “a common passageway or public area”); *Cornell v ERP Operating Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued 9/19/06 (Docket No. 269331) (plaintiff tripped on “the elevation disparity between the parking lot and the sidewalk” which she could not see because none of the lights in the parking area were working), holding that a parking lot was a “common area” under *Benton v Dart Properties*, *supra*.

Such an analysis, of course, makes sense. A residential tenant leases exclusive use of a portion of the premises, but also pays for access to the rest of the building and its surroundings. If the lease grants him the privilege of parking a motor vehicle on private property that would otherwise be barred to him, the parking lot is a “common” area within the meaning of MCL 554.139.

Defendant’s argument that “[a] parking lot is not a structure,” (defendant’s brief, p 25), then, is unconvincing. The “common areas” extend beyond the “structure” of the building.

***iii. A lessor has “control” of parking areas.***

It is well-settled that a landlord has “control” of the common areas of leased premises. See, e.g., *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 414; 224 NW2d 843 (1975) (Levin, J., dissenting); *Stanley v Town Square Co-op*, *supra*, 203 Mich App 146; *Petraszewsky v Keeth*, 201 Mich App 535, 541; 506 NW2d 890 (1993); *Bryant v Brannen*, 180 Mich App 87, 97; 446 NW2d 847 (1989); *Conerly v Liptzen*, 41 Mich App 238, 241; 199 NW2d 833 (1972).

The term “control” itself, however, is not defined. Dictionary definitions include “to exercise restraining or directing influence over esp. by law; to have power or authority over” (<http://dictionary.reference.com>); “power or authority to guide or manage” ([www.m-w.com](http://www.m-w.com)); and “the power to direct, manage, oversee and/or restrict the affairs, business or assets of a person or entity” (<http://dictionary.law.com/>).

Defendant overextends the meaning of “control” in the lessor-lessee context, stating that “[a] landlord does not possess exclusive control over a parking lot,” because “[i]ts use is widespread by members of the public as well as tenants.” This argument, however, would read virtually every part of a building out of the concept of “common area.”

Certainly in a building open to the public, such as the office building in *Samson*,<sup>5</sup> the “common areas” are in “widespread use” by persons other than the tenants themselves. Even in a residential setting, the halls, stairwells, porches and other parts of the building are regularly traversed by such non-tenants as mail carriers, delivery persons and distributors of advertising flyers.

It is illogical to suggest that parking lots, sidewalks and the like are not “under the control” of the landlord. Only the landlord can secure a loan against their value. Only the landlord has the duty to pay taxes assessed against the property, whose value includes that of the entire parcel. Only the landlord can order repairs or alterations. Only the landlord can authorize others to make use of them or, for the most part, order others to stay away from them.

If are parking lots and sidewalks are not “common areas,” what can they possibly be? They certainly are not part of the tenant’s “premises,” because the tenant lacks either “possession” or “control” over them. They clearly belong to the landlord, who must accept the responsibility of ownership along with its benefits.

The fact that persons other than the landlord have access to an area, then, does not mean that the lessor has ceded “control” over it. It remains a “common” area.

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<sup>5</sup> In *Samson*, the plaintiff was an employee of a tenant of an office building who was raped in an elevator by a client of another tenant.

(b)

**“Residential premises” include the entire area occupied by an apartment complex.**

*i. “Residential” premises extend beyond “buildings and structures.”*

Black defines “premises” as “[a] house or building *along with its grounds.*” Black’s Law Dictionary (7<sup>th</sup> ed), p 1199 (emphasis supplied).

The statute itself does not define “residential premises.” The definition of “residential structure” in the occupation code, however, is instructive.

“Residential structure” means *a premises* used or intended to be used for a residence purpose *and related facilities appurtenant to the premises*, used or intended to be used, as an adjunct of residential occupancy. MCL 339.2401(c). [Emphasis supplied.]

As in the case of “common area,” *supra*, it is relevant to an appreciation of legislative intent to look at what the Legislature did when it had the need to define a term whose meaning is generally understood outside the statutory context. In that situation, the Legislature defined “structure” as “a premises,” but extended it to “related facilities appurtenant to the premises.”

*ii. The general rule is that a landlord is responsible for areas outside the walls of the building.*

The majority view in American law extends the duty of the lessor of residential property beyond the four walls of the tenant’s apartment. The Restatement expresses as a general rule:

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor’s control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

\* \* \*

*d. The rule stated in this Section applies not only to the hall, stairs, elevators, and other approaches to the part of the land leased to the lessee as a flat, office, or room in a tenement or boardinghouse, but also to such other parts of the land or building to the use of which by the express or implied terms of the lease the lessee is entitled, usually in common with other lessees, such as a bathroom in a boardinghouse and the roof or yard of a tenement building or apartment house.* [Restatement Torts, 2d § 360. Emphasis supplied.]

Another source specifically refers to “parking lots” and “sidewalks” in describing “common” areas:

*The “common use rule” imposes a duty upon a landlord to exercise ordinary care to keep common use areas, such as parking lots, sidewalks, and steps, in reasonably safe condition for the use intended, and the landlord is liable to the tenant and others claiming under the tenant’s title for personal injuries resulting from a failure to perform that duty.” [52A CJS, Landlord & Tenant, §897. Footnote omitted. Emphasis supplied.]*

Indeed, where other states’ courts have had occasion to consider the question, they have almost universally found that the parking lot of a residential complex was part of the “common area.” See *Smith v Grove Apartments, LLC*, \_\_\_ So2d \_\_\_, \*3, n 9 (Fla Dist Ct App, 2007); *Ransburg v Richards*, 770 NE2d 393, 399 (Ind Ct App, 2002); *Lakeview Associates, Ltd v Maes*, 907 P2d 580, 585, n 8 (Colo, 1995); *Commerce Properties, Inc v Linthicum*, 434 SE2d 769 (Ga Ct App, 1993); *Erickson v Wasatch Manor, Inc*, 802 P2d 1323, 1327 (Utah Ct App, 1990).

***iii. The requirements of MCL 554.139 are not confined solely to that portion of the “premises” in which a tenant “resides.”***

MCL 554.139(1) refers to the lessor’s “covenant” in every “lease . . . of residential premises . . .” Subsection (a) describes the “covenant . . . that” “the premises” and “all common areas” are fit for the use intended by the parties. Subsection (b) provides that the “covenant” is “[t]o keep the premises in reasonable repair.”

That is, the phrase “residential premises” appears only in MCL 554.139(1), where it modifies “lease.” “Residential premises” are distinct from other “premises,” such as those leased for commercial or industrial use. MCL 554.139, then, applies only to leases “of residential premises,” as distinct from leases of commercial or other premises. The specific provisions of the statute, however, do not refer to “residential premises.” There is no attempt to confine the application of the duty to the “residential” portion of “the premises” alone.

Defendant examines the words “residential” and “premises” separately (defendant's brief, pp 22-23), then reasons that:

A parking lot is obviously not a residence. It is not a structure, a building, or part of a building. Nor is it land and the building on it. Therefore, it does not constitute “residential premises.” [Defendant’s brief, p 23.]

A “lease of residential premises,” however, allows the lessee access to parts of the “land and the buildings on it” or “a building or part of a building” (to borrow defendant's dictionary definitions of “premises”) that are not strictly “containing houses rather than offices, shops, etc.” or “of, concerned with, living in a place.” (Defendant's brief, p 23.)

The sidewalks and parking lots constitute part of the “building and its grounds.” Black’s, *supra*. They are “common areas” of an apartment complex.

### ARGUMENT III

#### **A LESSOR’S DUTY UNDER MCL 554.139(1)(a) AND MCL 554.139(1)(b) INCLUDES TAKING REASONABLE MEASURES TO CORRECT THE HAZARDS POSED BY SNOW AND ICE.**

##### Standard of review

See Argument I.

##### **(a)**

##### **Under an appropriate construction of MCL 554.139(1)(b), a landlord’s duty to keep “the premises” in reasonable repair extends to sidewalks and parking lots.**

##### *i. 554.139 was a remedial statute.*

“At common law, a landlord generally had no duty to provide a habitable rental property.” 49 Am Jur Landlord and Tenant, § 447, citing *Lian v Stalick*, 25 P3d 467 (Wash Ct App, 2001). See, generally, 3 Harper, James & Gray, *The Law of Torts* (3<sup>rd</sup> ed), §§ 26.16-26.17. “At common law the covenant to pay rent was independent from the covenants to repair and comply with any health or safety laws or regulations.” *Rome v Walker*, 38 Mich App 458, 461; 196 NW2d 850 (1972).

Michigan, like most other American jurisdictions, long ago altered the common law rule by statute. The first version of the present law appears in the 1846 statutory compilation. The earlier form of the present statute was enacted as 1917 PA 167, § 71. It appeared in 1929 CL § 2559:

Every dwelling and all parts thereof shall be kept in good repair by the owner, and the roof shall be kept so as not to leak, and all rain water shall be so drained and conveyed therefore as not to cause dampness in the walls or ceilings.

In 1925, this Court held that the statute “abrogates the common-law rule” that, unless the lease required it, the lessor was not responsible for repairs. *Annis v Britton*, 232 Mich 291, 293; 205 NW 128 (1925). The court specifically held that it created a private right of action:

On behalf of defendant it is said the housing law is a penal statute, and cannot be invoked by plaintiff as a basis for exacting civil accountability from defendant. The statute imposes a specific duty, and if the negligent failure to perform such duty is the proximate cause of an accident to the tenant, civil accountability may be exacted of the owner. [232 Mich 294-295.]

The bill, 1968 PA 295, that became MCL 554.139 was part of a package of reform legislation introduced in 1968. A comprehensive history appears in Michigan Landlord-Tenant Law: Course of Statutory Reform, 2 Prospectus<sup>6</sup> 225-246 (1968-69). One of the drafters explained, “prior to the enactment of the 1978 legislation in Michigan,” it was “only with great hesitation” that a tenant could “expect to persuade a trial judge that Michigan courts recognized an implied covenant of fitness in leases of residential property.” Carl Schier, *Draftsman: Formulation of Policy*, 2 Prospectus 227, 233 (1968).

MCL 554.139, then, was intended to remedy a problem created by the common law, which traditionally left the tenant to his own devices when it came to repairs.

***ii. Remedial statutes must be liberally construed.***

It is a general rule that remedial statutes “are to be liberally construed, favoring the persons the Legislature intended to benefit.” *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 611; 566 NW2d 571 (1997). “[A] remedial statute . . . which attempts to protect the public health and general welfare should be liberally construed.” *Soap & Detergent Ass’n v Natural Resources Comm.*, 415 Mich 728, 740, 330 NW2d 346 (1982), citing 3 Sands, Sutherland Statutory Construction (4th ed) § 65.03, p 163.

In *Birznieks v Cooper*, 405 Mich 319; 275 NW2d 221 (1979), this Court held that the plaintiffs had “paid” the amount necessary to redeem their property when they mailed two personal checks to the defendants’ attorney on the last day of the redemption period. In explaining the holding, Justice Levin discussed the nature of “liberal construction.” “What is called a liberal construction is ordinarily one *which makes the statutory rule or principle apply to more things or in more situations* than would be the case under a strict construction.” 405 Mich

331, n 12, quoting 3 Sutherland, Statutory Construction, § 60.01, p 29 (emphasis supplied).

“Liberal construction” entails “giving the words . . . the largest, the fullest, and most extensive meaning of which they are susceptible.” 405 Mich 331, n 12, quoting Enlich, Interpretation of Statutes, § 107, p 142.

**iii. A liberal construction of MCL 554.139 requires applying it to parking lots and sidewalks.**

In *People v Gould*, 237 Mich 156; 211 NW 346 (1926), this Court stated that, “[i]t is an old and well-recognized rule that, when omissions, defects, or imperfections in a previously existing law have been supplied or corrected in subsequent legislation, they should be liberally construed for the advancement of the remedy and suppression of the mischief against which they are directed.” 237 Mich 163.

As discussed *supra*, the predecessor of MCL 554.139 required landlords to “keep in good repair” only “dwelling[s] and all parts thereof.” 1929 CL § 2559. The contemporary statute “corrected” an “imperfection”<sup>7</sup> by expanding the landlord’s duty to “the premises and all common areas . . .” These terms should be given a liberal construction.

“Giving the words . . . the . . . most extensive meaning of which they are susceptible,” *Birznieks, supra*, results in a construction of the term “premises” to encompass the common areas, such as sidewalks and parking lots, to which tenants have access.

**iv. An icy parking lot is not “in reasonable repair.”**

In Michigan, the leading case on a business’s duty to invitees with respect to ice and snow is *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975). The plaintiff slipped on snow and ice in a parking lot; it had been several days since the snow had fallen but the lot was “snow-covered and icy.” 395 Mich 247. The plaintiff obtained a jury

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<sup>6</sup> In 1969, this periodical was renamed “The University of Michigan Journal of Law Reform.”

<sup>7</sup> In *People v Sarnoff*, 302 Mich 266; 4 NW2d 544 (1942), the defendant challenged the statute as unconstitutionally vague. Three Justices agreed with him. “The mandate to keep in good repair

verdict but the Court of Appeals reversed. This Court then reversed the Court of Appeals. *Quinlivan* followed the opinion<sup>8</sup> of the Supreme Court of Alaska – obviously known for its frequent accumulations of snow and ice – and abolished the “natural accumulation” rule in the case of business invitees.

While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. . . [395 Mich 261. Footnote omitted. Emphasis supplied.]

Unless an exception applies, then, if a “natural accumulation of snow and ice” exists, the owner of the premises must “[take] reasonable measures . . . within a reasonable time” to correct it. The exercise of “reasonable measures” within a “reasonable time” is the appropriate standard for determining whether a parking lot is in “reasonable repair.”

(b)

**The lessor’s covenant that “all common areas are fit for the use intended by the parties” encompasses undertaking “reasonable measures within a reasonable time” to “diminish the hazards” posed by snow and ice.**

*i. The lessor’s guarantee that the common areas “are fit for the use intended by the parties” should not depend on when the lease was signed.*

One of the drafters of MCL 554.139 explained the reasoning behind the inclusion of subsection (1):

Under the new statute [MCL 554.139] the occupant of rented housing, whether a lessee or a licensee, has the benefit of two covenants which will be found in every rental agreement. The first covenant is in effect a warranty that the premises are fit for the uses intended by the parties at the time of taking possession. The second is in effect a promise of future performance and states that the lessor or licensor covenants to keep the premises in reasonable repair during the term of occupancy and to comply with all applicable health and safety laws. . . . Even though the State Housing Law imposes on the owners of all dwellings a general duty to repair, that obligation ordinarily does not give rise to

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is indefinite and fails to inform the owner in advance what he must do or may not do.” 302 Mich 273 (Boyles, J., dissenting).

<sup>8</sup> *Kremer v Carr’s Food Center, Inc*, 462 P2d 747 (Alas, 1969).

implied or constructive contractual obligations on which the tenant may rely. Therefore *it was felt necessary to establish as a matter of law the landlord's promissory duty to make the premises fit for habitation at the time of taking possession and throughout the term or period of tenancy.* [Schier, *Draftsman: Formulation of Policy*, 2 Prospectus 227, 233 (1968). Emphasis supplied.]

The creators of the law, then, intended a continuing obligation on the part of the landlord.

Indeed, it would be illogical to make the lessor's guarantee of "fit[ness] for the use intended by the parties" dependent on when the parties happened to enter into the lease. A tenant who rents an apartment on a sunny day has a right to expect that the roof will not leak when it rains, just as a tenant who signs his lease in August should not be precluded from asserting a right to heat in the fall.

Similarly, the lessor's warrant that "all common areas" are "fit" must extend to the winter months. Simply because the sidewalks and parking lot are in walkable condition on the day the lessor or his agent executes a rental contract does not mean that the landlord is absolved of all responsibility for seeing that they remain that way.

***ii. Walking to or from a parked vehicle is an intended use of a parking lot.***

As the Court of Appeals stated in *Benton, supra*, "[b]ecause the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose." 270 Mich App 444. The same reasoning applies to parking areas.

Defendant maintains that:

[T]he "intended" use of a parking lot is as a spot to park and store vehicles. It is a place for operating motor vehicles. That people may walk in parking lots only to access their vehicles is of no moment. In any event MCL 554.139(1)(a) speaks only in terms of a single intended "use," not "uses." All would agree that the intended use of a parking lot is as a place to park cars.

\* \* \*

So that is the only way the *Allison II* court should have viewed this parking lot. On that point, cars traverse snowy parking lots with far greater ease than do humans. Thus, covered with ice, a parking lot is still fit for its intended use. [Defendant's brief, p 30.]

This argument is simply untenable. What would defendant have its tenants do after they have parked their cars? Reach their apartments via helicopter or hot-air balloon? Of course “parking” a car involves walking to and from it.

Defendant’s narrow interpretation of “use” is exactly what the direction in MCL 554.139(3) that “[t]he provisions of this section shall be liberally construed,” is intended to prevent.

*iii. A lessor of residential property is held to the same standard as any other landowner who profits from the presence of invitees.*

The *Quinlivan* rule governed Michigan’s snow-and-ice jurisprudence for 25 years, until this Court’s decision in *Lugo v Ameritech Corp, supra*, and the Court of Appeals’ cases that followed it. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002).

If *Allison II* is allowed to stand, the standard of care for owners of residential property will revert to what it was for the generation between *Quinlivan* and *Lugo*: to take “reasonable measures” within a “reasonable time.” It would be left to the common sense of the finders of fact whether, in any specific situation, the landlord had done what was expected of him.

The trial court in the present case made several references to what the court saw as an unreasonable expectation of the defendant.

I note the snow fell overnight, I might add, and so when are they going to get – I don’t even know whether it was falling or not at the time, but if it was at one to two inches, usually most contracts for snow removal call for two inches, but apart from that, the argument is that special interest [*sic*] exists if the condition is effectively unavoidable or constitutes an unreasonably high risk of severe harm. I don’t think one to two inches – and I think in Michigan you would know that ice can in fact accumulate under snow because there has been prior snow and ice generally and there has been melting. . . . [Appendix, pp 50a-51a.]

[A]gain I point out this was an overnight snow fall – after an accumulation of snow and ice, to diminish the hazard of injury to the invitee. [Appendix, p 52a.]

The decision of whether defendant should have remedied the condition of the parking lot, however, belongs to the finders of fact.

MCL 554.139(1) sets a standard of care for lessors of residential property. Whether an individual landlord in a specific case has lived up to it will depend on the judgment of the jury.

The Court of Appeals' decision in *Allison II* did no more than restore a landlord's duty to that of any other landowner who expects to profit from the presence of people on his property.

This Court should affirm.

**RELIEF REQUESTED**

Plaintiff-appellee Irving Allison, through his attorney Barbara H. Goldman, respectfully asks that this honorable court AFFIRM the March 15, 2007 opinion of the Court of Appeals.

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December 13, 2007