STATE OF MICHIGAN
IN THE SUPREME COURT

JAN BOWERMAN, Plaintiff-Appellant, v. RED OAK MANAGEMENT CO, INC, and WESTVELD SERVICES, LLC, Defendants-Appellees.	MSC No. 167718 COA No. 366338 Montcalm County Circuit Court Case No. 2022-S-28824-NO Filed under AO 2019-6

DEFENDANT-APPELLEE RED OAK MANAGEMENT CO, INC'S SUPPLEMENTAL BRIEF

Daniel J. James (P75147)
WHEELER UPHAM, P.C.
250 Monroe Ave NW, Ste 100
Grand Rapids, MI 49507
(616) 459-7100
james@wuattorneys.com
Attorneys for Defendant-Appellee Red Oak

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STATEMENT OF JURISDICTION

Pursuant to MCR 7.305(H)(1), on June 6, 2025, this Court issued an order directing the Clerk to schedule oral argument on Plaintiff-Appellant's Application for Leave to Appeal the September 12, 2024 opinion of the Court of Appeals. *Bowerman v Red Oak Mgt Co, Inc*, 21 NW3d 186 (Mich, 2025).

This Court further ordered the parties to file supplemental briefs addressing, as to Defendant Red Oak Management Co., Inc., "whether genuine issues of material fact exist as to whether: …(2) defendant Red Oak Management Co., Inc., violated MCL 554.139(1)(a)." *Id*.

INTRODUCTION AND SUMMARY OF THE REASONS TO DENY THE APPLICATION FOR LEAVE TO APPEAL OR AFFIRM THE LOWER COURTS

This lawsuit arises out of a trip and fall incident that occurred on October 30, 2021. Plaintiff-Appellant Jan Bowerman tripped and fell due to a skinny, shallow so-called "trench" in the parking lot at an apartment complex managed by Defendant-Appellee Red Oak Management Co, Inc. A picture of the area[1] is below:

Some concrete work had recently been performed at the apartment complex, including pouring a new cement slab, or pad, that was where the garbage dumpster was typically located. To accommodate the work, the dumpster was moved to the west side of the slab. The subject trench spanned the north end of the slab and had been created when the cement contractor, Defendant-Appellee Westveld Services, LLC, removed the form

[1] Plaintiff Appx at 156a.

used to pour the slab. The plan was for the trench to be filled in soon by another contractor, but that contractor became delayed.

Plaintiff is a resident of the apartment complex and was a former employee of Defendant Red Oak and site manager of the apartment complex. Plaintiff knew about the cement work that started around October 14, 2021. She knew about the trench. She knew it spanned the north end of the slab. She had seen it every day when she had taken her trash out or parked her car. She also knew the dumpster was off to the west side of the slab.

On October 30, 2021, in the early morning, Plaintiff went to take her trash to the dumpster. She was walking west on the sidewalk toward the dumpster. She was approaching the east side of the slab. She concedes the slab was visible even though it was before sunrise. To access the dumpster, she could have walked across the slab and avoided the trench by staying south of it. Instead, she chose to step off the sidewalk and into the parking lot to walk around the trench to the north. Despite the fact that the slab was visible and she knew the trench was on the north end of the slab, Plaintiff stepped into the end of the trench and fractured her ankle.

Plaintiff brought a claim against Defendant Red Oak under only MCL 554.139, which requires every residential lease to include certain covenants. MCL 554.139(1)(a) provides in relevant part that "In every lease … of residential premises, the lessor … covenants: (a) That … all common areas are fit for the use intended by the parties." Under Michigan law, an isolated, avoidable defect on a parking lot does not render the parking lot unfit for its intended use as a matter of law. There is no reason to deviate from that rule under the facts of this case. Plaintiff knew the trench was there, it was avoidable, she and others had, in fact, avoided it many times before, and she otherwise had no concerns about the parking lot. The trench did not prevent tenants from parking their cars or accessing their vehicles or the dumpster.

The trial court granted summary disposition for Defendant Red Oak under MCR 2.116(C)(10), finding that the trench did not render the parking lot unfit for its intended use, and the Court of Appeals affirmed. The

majority noted that Plaintiff "clearly knew of the trench's location," "she had successfully avoided it when taking her trash out every day," and she "was not forced to encounter the trench to access the dumpster" because there were "two entrances to and exits from the dumpster area that avoided the trench."[2] The Court of Appeals correctly held that there were no genuine issues of material fact that the parking lot was fit for its intended use.

The dissent noted that there were no "visual aids" to warn of the trench. But the dissent did not appreciate that because the light gray cement slab was visible, which Plaintiff concedes, and Plaintiff knew the trench spanned the north end of the slab, the slab itself was a visual aid to warn of the trench's location. The dissent also did not fully appreciate that there was another route to the dumpster that did not require her to encounter the trench. The dissent also seemed to think that, contrary to Michigan law, the parking lot had to be free of trip hazards to be fit for its intended purpose.

The Court of Appeals' decision was not clearly erroneous and will not cause substantial injustice. MCR 7.305(B)(5)(a). The decision likewise does conflict with a Supreme Court ruling or another decision of the Court Appeals. MCR 7.305(B)(5)(b). Indeed, the Court of Appeals properly applied the principles set forth in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), and its progeny, to the facts of this case, and its decision is consistent with recent, factually similar decisions by other panels of the Court of Appeals. This Court should not be "left with the definite and firm conviction that a mistake has been made."[3] For the same reasons, this Court should not reverse the decision of the Court of Appeals.

As such, Defendant Red Oak requests that this Court deny Plaintiff's application for leave to appeal or affirm the Court of Appeals.

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[2] *Bowerman v Red Oak Mgt Co, Inc*, unpublished opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 366338), 2024 WL 4183299.

[3] *Pegasus Wind, LLC v Tuscola Cnty.*, 513 Mich 35, 45; 15 NW3d 108 (2024).

COUNTER-STATEMENT OF QUESTION INVOLVED AS TO DEFENDANT RED OAK

Did the lower courts correctly conclude that there was no genuine issue of material fact that the parking lot was fit for its intended use where the condition at issue was known, isolated, and avoidable and did not prevent tenants from parking and accessing their vehicles or accessing the dumpster?

Plaintiff-Appellant answers:	No.
Defendant-Appellee Red Oak answers:	Yes.
The Circuit Court answered:	Yes.
The Court of Appeals answered:	Yes.

STATEMENT OF FACTS

Defendant Red Oak relies upon and incorporates by reference the "Statement of Facts" contained in "Defendant-Appellee Red Oak Management Co, Inc's Answer to the Application for Leave to Appeal of Plaintiff-Appellant Jan Bowerman" and the statement of facts recited in the majority opinion of the Court of Appeals.

ARGUMENT

I. Defendant Red Oak did not violate MCL 554.139(1)(a) and was properly granted summary disposition.

A. Standard of Review

Red Oak agrees with Plaintiff's statement of the legal standard with respect to motions for summary disposition under MCR 2.116(C)(10).

B. There was no genuine issue of material fact that the parking lot was fit for its intended use under MCL 554.139(1)(a).

1. A claim under MCL 554.139 is a contract, breach of lease claim.

Plaintiff's only cause of action against Red Oak is under MCL 554.139, which provides in relevant part as follows:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

Accordingly, MCL 554.139(1)(a) requires every residential lease to have a covenant of fitness, and MCL 554.139(1)(b) requires a covenant of repair. This Court asked the parties to file supplemental briefs only as to the covenant of fitness.

In this case, Plaintiff did not file a common law premises liability claim against Defendant Red Oak. Plaintiff specifically disavowed making a common law tort claim against Defendant Red Oak. In Response to Defendant Red Oak's motion for summary disposition, Plaintiff stated, "Plaintiff's Complaint … does not and never has alleged a common law premises liability claim. In other words … the duty owed to Plaintiff in this case does not arise from the common law but it based solely on MCL 554.139."[4]

By its terms, MCL 554.139 imports covenants into a residential lease agreement. Accordingly, Plaintiff's claim is a breach of lease, contract claim, and it should be treated as such.

In addition to the plain language of the statute, the fact that a claim under MCL 554.139(1) is a contract claim is also evidenced by the following:

- Only a party to the lease agreement can bring such a claim. See *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007)("The covenants created by [MCL 554.139(1)] establish duties of a lessor or licensor of residential property to the lessee or licensee of the residential property, most typically of a landlord to a tenant. By the terms of the statute, the duties exist between the contracting parties. The defendant landlord did not have a duty under MCL 554.139(1) to the plaintiff, a social guest of the tenant.")
- "The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year." MCL 554.139(2).
- The open and obvious doctrine – a tort doctrine (when it existed) – did not defeat a landlord's obligations under MCL 554.139. See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

[4] Plaintiff Appx at 175a (underline in original).

- A recent panel of the Court of Appeals has held a lessor need not have notice to be liable under MCL 554.139(1)(a). See *Thiel v Pines at Cloverlane, LLC*, unpublished opinion of the Court of Appeals, issued June 27, 2024 (Docket No. 366096)[5]("Because there is no published caselaw holding that a lessor must have notice of unfit conditions to be liable under MCL 554.139(1)(a), and the statute itself does not contain a notice requirement, we will not engage in judicial legislation by adding language to the statute and requiring notice under MCL 554.139(1)(a).")
- "MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Allison* at 425 (italics in original).
- The covenants in MCL 554.139 "are mutual with, rather than independent of, the covenant to pay rent." *Rome v Walker*, 38 Mich App 458, 463; 196 NW2d 850 (1972).

Thus, MCL 554.139 was not enacted with personal injury claims in mind. Tort law already addressed that. Rather, it was concerned with the useability of common areas. MCL 554.139 "was enacted in 1968 to codify the common-law implied warranty of habitability." *Stacker v Lautrec, Ltd*, 503 Mich 991; 924 NW2d 243, 244 (2019)(VIVIANO, J. concurring).

However, after the open and obvious doctrine was adopted to negate the existence of a tort duty owed by a premises possessor,[6] use of MCL 554.139 to avoid the open and obvious doctrine exploded.[7] But it was really trying to fit a square peg in a round hole. MCL 554.139 jurisprudence would probably look different if the outcome in *Lugo* had been different.

Generally, "the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170; 809 NW2d 553 (2011). "'Whether a particular defendant owes *any duty at all* to a particular plaintiff [in tort],' is generally determined without regard to the obligations

[5] Plaintiff's Appx at 304a.
[6] *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).
[7] Around 257 cases, opinions, and/or orders reference MCL 554.139; 243 of them were issued after *Lugo*.

contained within the contract. *Id*. at 171 (emphasis in original)(citations omitted).

It does not appear that any published Michigan appellate court has ever held that the covenants imposed by MCL 554.139 give rise to an action in tort. In *Kuyk v Green*, 219 Mich 423, 425; 189 NW 25 (1922), the Court held that "an action in tort cannot be predicated, by a tenant, upon a breach by the lessor of an agreement to make repairs." In *Mobil Oil Corp v Thorn*, 401 Mich 306; 258 NW2d 30 (1977), which did not expressly address MCL 554.139, the Court overruled *Kuyk* and adopted 2 Restatement of Torts, 2d, § 357, which subjects a lessor to potential "liability for physical harm" to a lessee for failing to keep the land in repair. But, *Kuyk* and § 357 addressed only the covenant to repair, not the covenant of fitness.

While *Mobil Oil* established, at best, that a violation of MCL 554.139(1)(b) gave rise to a claim in tort, even that that is questionable, because in *Woodbury v Bruckner*, 464 Mich 875; 629 NW2d 401 (2001), as amended (July 10, 2001), this Court remanded a case to the Court of Appeals, instructing them to determine "whether the covenant imposed by M.C.L. § 554.139 gave rise to a duty in tort …." If *Mobil Oil* had already established this, then there would have been no need for this instruction. However, on remand, the Court of Appeals did not decide the issue, stating that since there were already such tort duties "whether an independent duty in tort also arises by operation of M.C.L. § 554.139 is irrelevant." *Woodbury v Bruckner*, 248 Mich App 684, 695; 650 NW2d 343 (2001). The Court of Appeals case also addressed only the covenant of repair, not the covenant of fitness.

In *Allison*, *supra* at 426 n 3, the Court then rejected application of § 357 to claims under MCL 554.139, explaining that "section [357] of the Second Restatement of Torts applies to the tort of negligence. We reiterate that the merits of plaintiff's negligence claim are not before this Court." Similarly in this case, there is no negligence claim before the Court. The *Allison* Court also indicated that § 357 only applies to the covenant of repair. *Id*. In other words, it does not appear that any published Michigan court case has ever held that the covenant of fitness in MCL 554.139(1)(a) gives rise to a claim in tort.

All this is to emphasize that the claim against Defendant Red Oak before this Court is a contract claim. It is not a tort claim. If Plaintiff had made a common law premises liability claim against Defendant Red Oak, the question would have been whether the subject trench was a dangerous condition that posed an unreasonable risk of harm. *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95, 112; 1 NW3d 44 (2023). The focus would have been on the trench itself, and not the parking lot as a whole. Frankly, if Plaintiff had made a common law premises liability claim, we would most likely not be before this Court.

However, Plaintiff has only made a claim under MCL 554.139, and has expressly disavowed making a common law premises liability claim. Therefore, the question is whether the "common area," i.e., the parking lot, was "fit" for its intended use. Accordingly, the focus is more on the parking lot as a whole rather than on the trench itself.

2. *Allison v AEW Capital Mgt, LLP*

The last Michigan Supreme Court opinion to address MCL 554.139 is *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In *Allison*, the plaintiff "fractured his ankle during a fall when he was walking on one to two inches of accumulated snow in the parking lot of his apartment complex. He then noticed ice on the ground where the snow had been displaced." *Id*. at 422. The plaintiff filed suit against the defendant apartment complex owner, alleging both negligence and breach of the covenants set forth in MCL 554.139(1).

As to the claim under MCL 554.139(1),[8] the Court explained the contractual nature of the claim as follows:

> MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law. The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties and

[8] The merits of the negligence claim were not before the court. *Allison* at 425 n 1.

> any remedy under the statute would consist exclusively of a contract remedy. [*Id*. at 425-426 (italics in original).]

The Court explained that it must interpret the terms in MCL 554.139 according to their plain and ordinary meaning:

> The primary goal of statutory interpretation is "to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." If the language of the statute is clear, we presume that the Legislature intended the meaning expressed. If the statute does not define a word, we may consult dictionary definitions to determine the plain and ordinary meaning of the word. However, legal terms of art are to be construed according to their peculiar and appropriate meaning. [*Id*. at 427.]

The Court observed that the covenant of fitness in MCL 554.139(1)(a) applies to both "premises" and "common areas," while the covenant of "reasonable repair" in subsection (1)(b) applies only to "premises," not "common areas." *Id*. at 435.

The Court next held that apartment complex parking lots are "common areas" under MCL 554.139(1)(a). *Id*. at 428. Accordingly, "under MCL 554.139(1)(a), the lessor effectively has a contractual duty to keep the parking lot 'fit for the use intended by the parties.'" *Id*. at 429.

The *Allison* Court consulted a dictionary for the definition of "fit," which was defined as "adapted or suited; appropriate[.]" *Id*. at 429. Whether a common area is fit for its intended use depends on the primary intended use of the common area at issue, not just any use. *Id.* With respect to parking lots, the Court explained that:

> a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. [*Id*.]

In contrast, the primary intended use of a sidewalk is only walking. *Benton v Dart Properties, Inc,* 270 Mich App 437, 444; 715 NW2d 335 (2006).[9]

Applying these principles, the Court held that, although the parking "lot was covered with one to two inches of snow," "there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles." *Id*. at 430.

The Court explained that MCL 554.139(1)(a):

> 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 … will not defeat the characterization of a lot as being fit for its intended purposes." *Id*. at 430.

The Court also explained that the covenant of fitness under (1)(a) is "less onerous" than the covenant of reasonable repair duty under (1)(b). *Id*. at 433. Accordingly, with regard to potholes in parking lots, a lessor may arguably have to fill a pothole to comply with the covenant of reasonable repair under (1)(b) but not to comply with covenant of fitness under (1)(a). *Id*.

In summary, the takeaways from *Allison* are:

- MCL 554.139 provides protection to lessees in *addition* to those provided by the common law.
- The statutorily required covenants become terms of the lease.
- A breach of the covenants is a breach of the terms of the lease.
- Any remedy consists exclusively of a contract remedy.
- The terms of the covenants are to be given the plain and ordinary meaning.

[9] Accordingly, as a matter of logic, one court has observed that "a condition that renders a sidewalk unfit for use may not have the same effect on a parking lot." *Solomon v Blue Water Vill E, LLC*, unpublished opinion of the Court of Appeals, issued July 29, 2010 (Docket No. 291780), 2010 WL 2977334, p *3.

- Only the covenant of fitness under MCL 554.139(1)(a) applies to common areas.
- Parking lots at apartment complexes are common areas.
- "Fit" means "adapted or suited; appropriate[.]"
- The covenant of fitness is "less onerous" than the covenant of repair.
- The primary purposes of a parking lot is to park and access cars.
- A parking lot does not have to be maintained in an "ideal condition."
- A parking lot does not have to be maintained in the "most accessible condition possible."
- "Mere inconvenience of access" does not prevent a parking lot from being fit for its intended purpose.

3. Analysis

In this case, there is no dispute that Defendant Red Oak's parking lot was a "common area." There is also no question as to what the intended use of a parking lot is, i.e., park cars and access cars and, in this case, the dumpster. The issue in this case is whether there could be "reasonable difference of opinion regarding" whether the parking lot was "fit" for those intended uses.

In analyzing this issue, it must be kept in mind that the question is not simply whether or not the trench in this case is a defect or trip hazard; that would be more relevant if Plaintiff had brought a common law premises liability claim against Defendant Red Oak. Rather, the question is whether the common area was fit for its intended purpose. When the facts of this case are analyzed from this perspective, it is apparent that the trial court and Court of Appeals were correct in ruling that there was no genuine issue of material fact that the parking lot here was fit for its intended use.

In this case, Plaintiff had no concern about walking in the parking lot, even after dark.[10] So, the question then is whether there is a genuine

[10] Plaintiff Dep Trans at 37, Plaintiff Appx at 061a.

issue of material fact that this trench made this otherwise fit parking lot unfit for its intended purposes.

When the issue is whether a surface level condition renders an entire common area unfit for its intended use, avoidability has been perhaps the most important consideration. Where the condition is isolated and avoidable, the courts have generally found that – as a matter of law – the common area remained fit for its intended use. As Justice Markman observed:

> a tenant's ability to avoid a condition is, in fact, highly relevant to whether the condition is only a 'mere inconvenience of access.' As *Allison* explained, "[m]ere inconvenience of access" does "not defeat the characterization of [the premises] as being fit for its intended purposes." The relevant inquiry under the "intended use" covenant is whether, and to what degree, a condition interferes with the intended use of the premises. [*Martin v Milham Meadows I Ltd Pship*, 501 Mich 1002; 907 NW2d 597, 598 (2018)(MARKMAN, C.J., dissenting in the Court's denial of the application for leave to appeal)(citations omitted).]

In *Bowman v Walker*, 340 Mich App 420, 433-434; 986 NW2d 419 (2022), the plaintiff slipped due to snow/ice on a sidewalk. The Court of Appeals reversed summary disposition in favor of the premises possessor with respect to the plaintiff's common law premises liability claim, but the Court affirmed summary disposition for the defendant with respect to the claim under MCL 554.139(1)(a) because the evidence did not show that the entire sidewalk was covered with ice. The Court explained:

> In sum, although a sidewalk *completely covered* in ice is unfit for its intended purpose, a sidewalk *covered only in patches* of ice does not render the sidewalk unfit for its intended purpose. In this case, plaintiffs have only presented evidence that snow and ice were present and that [the plaintiff] fell. Even viewing the evidence in the light most favorable to plaintiffs, they have only shown that the sidewalk had some ice and snow on it, which at most indicated that there was inconvenience of access or that the patio was not in peak condition. They have not shown, however, that there is a genuine issue of material fact regarding whether the patio

> was fit for its intended purpose. The trial court, therefore, did not err by summarily dismissing plaintiff's claim that defendants violated MCL 554.139. [Italics added for emphasis.]

The fact that the common law premises liability claim was reinstated, but the claim under MCL 554.139(1)(a) remained dismissed, shows that the analysis is different, and the outcome need not be the same under both theories. That is, a claim under MCL 554.139(1)(a) is not just another way to make a common law premises liability claim.

See also, *Spitz v Occidental Dev, LLC*, unpublished opinion of the Court of Appeals, issued Nov 24, 2020 (Docket No. 351082), 2020 WL 6938048,[11] (holding that an avoidable depression on the sidewalk that caused the plaintiff to fracture his right foot did not render the sidewalk unfit) and *Herrera v Sun Troy Villa, LLC*, unpublished opinion of the Court of Appeals, issued October 19, 2023 (Docket No. 361852), 2023 WL 6937774,[12] (holding that a large height differential between two adjacent slabs of concrete in a sidewalk in very poor condition did not render the sidewalk unfit because the plaintiff knew of the sidewalk's condition and had walked over it a dozen times before.)

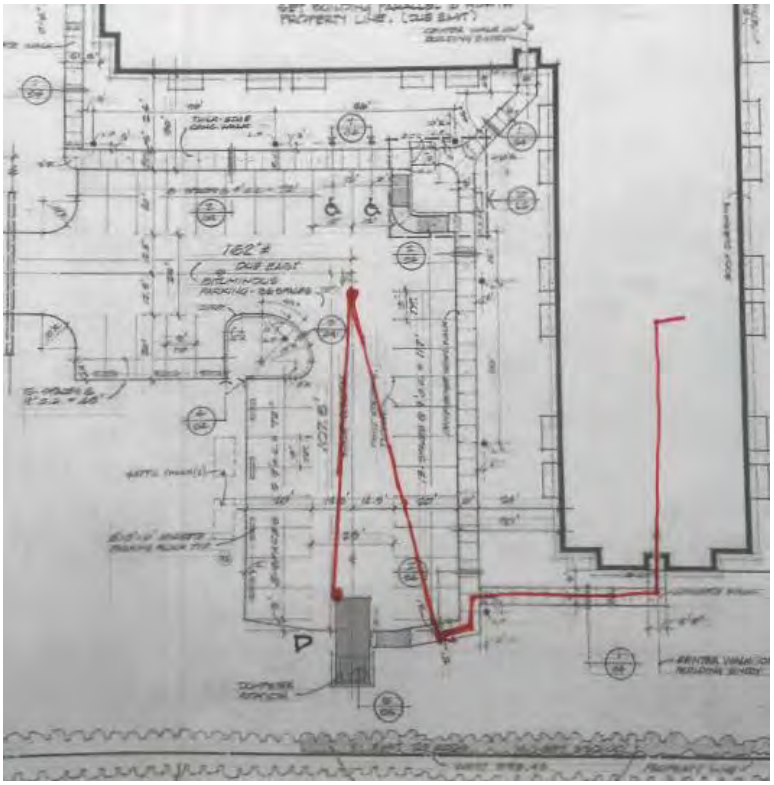
In contrast, in cases where the surface level condition cannot be avoided, the Courts have generally held that there was a question of fact where the common area was unfit. See, e.g., *Estate of Trueblood v P&G Apartments, LLC*,[13] (sidewalk completely covered with ice), *Stone v Boulder Creek Apts, LLC*,[14] (snow and ice completely covered the landscape and stairway), *Hadden v McDermitt Apartments, LLC*,[15] (icy stairs denied tenants access to other levels of the apartment building) and *Sedlecky v Sun*

[11] Plaintiff Appx at 161a-164a. Although *Spitz* is unpublished, it is cited not for a proposition of law but rather as an illustration of the application of the law to similar facts, which the Court may consider persuasive.
[12] Plaintiff Appx at 295a-303a. Although *Herrera* is unpublished, it is cited not for a proposition of law but rather as an illustration of the application of the law to similar facts, which the Court may consider persuasive.
[13] 327 Mich App 275; 933 NW2d 732 (2019).
[14] Unpublished per curiam opinion of the Court of Appeals, issued Nov 26, 2019 (Docket No. 346252)(Plaintiff Appx at 210a-214a).
[15] 287 Mich App 124, 132; 782 NW2d 800 (2010).

Communities, Inc,[16] (no hand rail or slip-resistant tread on the only stairs into the community pool).

In this case, the trench was a known, isolated, and avoidable condition that did not render this otherwise fit parking lot unfit. Plaintiff knew the trench was there,[17] and she had walked around it multiple times before when taking out her trash, which she did every day.[18] The trench was avoidable because it was a condition otherwise surrounded by surfaces that Plaintiff was comfortable traversing, even after dark.

Below is a blueprint of the premises.[19] The trench ran along the top of the gray rectangle at the bottom of the image. Accordingly, the trench occupied a very small percentage of the total surface area.



[16] Unpublished per curiam opinion of the Court of Appeals, issued Aug 20, 2020 (Docket No. 348520)(Plaintiff Appx at 203a-209a).
[17] Plaintiff Dep Trans at 29, Plaintiff Appx at 059a.
[18] *Id*. at 62, Plaintiff Appx at 068a.
[19] Plaintiff Appx at 160a. The redline, drawn by Defendant Red Oak's counsel, shows Plaintiff's path based on her testimony, although the exact point she reached in the parking lot before beginning to walk toward the dumpster is unclear.

Plaintiff did not have to go "way out toward the middle of the parking lot" to avoid the trench.[20] On her way to the dumpster, she was walking down the sidewalk that leads to the cement slab in the picture below. She could see that the dumpster was directly across from the slab, as the blueprint shows, with the "D" representing the location of the dumpster.[21] Accordingly, she could have stayed on the sidewalk and walked across the slab to the dumpster on the other side. This was a wheelchair accessible route. There had been caution tape up when the slab was wet, but it had been taken down because people could traverse the slab at the time of the incident.[22] Plaintiff would not have encountered any trench using this route.

Plaintiff Appx at 073a.

[20] Plaintiff Dep Trans at 28; Plaintiff Appx at 059a.
[21] Plaintiff Dep Trans at 35, Plaintiff Appx at 061a.
[22] Westveld Dep Trans at 14-16, Plaintiff Appx at 080a; Koch Dep Trans at 45, Plaintiff Appx at 100a.

Plaintiff Appx at 152a.

Plaintiff did not take this sidewalk-slab route. Instead, about halfway down the sidewalk toward the slab she stepped off into the parking lot.[23] But Plaintiff could have avoided the trench by going into the parking lot too.

Plaintiff says it was "complete darkness," but the picture on the top of the next page shows that that was not the case.[24]

[23] Plaintiff Dep Trans at 28, Plaintiff Appx at 059a.
[24] *Id*. at 36; Plaintiff Appx at 061a.

Plaintiff testified that the picture[25] above shows "how black it was out there."[26] Yet, she concedes that the "freshly poured concrete slab was relatively visible."[27] The front edge (or face) of the slab was visible, indicating the existence of a "height differential," i.e., the trench.[28] And, Plaintiff knew the trench was in front of the slab.[29] The concrete slab was effectively a warning sign. As such, a person walking in the parking lot could see the slab and walk around it.

[25] Plaintiff Appx at 158a.
[26] Plaintiff Dep Trans at 34, Plaintiff Appx at 061a.
[27] Plaintiff's Application at 12.
[28] Kerelis Dep Trans at 38, Plaintiff Appx at 124a.
[29] Plaintiff Dep Trans at 29, Plaintiff Appx at 059a.

There were lights around the parking lot. The picture in the Introduction[30] shows that. The dots along the sidewalk on the blueprint[31] show the location of all the lights. Her expert acknowledged that it was not pitch black at night and that he was able to see where he was going.[32] The level of light did not violate any local laws, which are actually concerned with lights being too bright. In that regard, apartments run all along with parking lot, and if the lights were too bright, tenants could have had an issue with that.

Plaintiff argues that the *Allison* Court never meant the phrase "mere inconvenience" to be a "*shield* for defendants to escape liability by characterizing an unfit common area as merely inconvenient."[33] Similarly, Plaintiff argues that "any time a common area is unfit it will surely 'inconvenience' tenants. So, … a lessor can essentially never violate MCL 554.139(1)(a) – the lessor can simply say that an unfit area is just an inconvenience."[34] However, the courts have not been ruling either expressly or impliedly that although the common area is unfit, there is a "mere inconvenience" exception. Rather, the courts have concluded that the existence of an isolated and avoidable defect alone does render an otherwise fit common area unfit; rather, it is a "mere inconvenience of access."

In this case, the fact that Plaintiff and other elderly and disabled tenants at the apartment complex had safely avoided the trench for more than a week is relevant to the issue of the avoidability of the trench and the fact that it did not deny access to their vehicles or the dumpster. Unlike in the cases relied upon by Plaintiff, the subject condition here did not completely cover the parking lot; it was limited to one very specific, known location, i.e., directly in front of the light gray cement slab. The trench did not deny Plaintiff, or any other disabled or elderly tenant, access to the dumpster or their cars.

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[30] Plaintiff Appx at 156a.
[31] *Id*. at 160a.
[32] Kerelis Dep Trans at 20-23, Plaintiff Appx at 119a-120a.
[33] Plaintiff Supplemental Brief at 27-28.
[34] *Id*. at 28.

Plaintiff's "two-sidewalk" example is not helpful in analyzing this case because it is factually inapposite, as it involves two distinct sidewalks, one of which is the most direct, shortest path from the front door to the bus stop but is in terrible condition and the other starting at the side door that is longer but is in great condition. In this case, however, there are not two discrete areas; the sidewalk, slab, and parking lot are all in one area. The condition was an island surrounded by a suitable surface. Plaintiff did not need to select a grossly inconvenient route to get to the dumpster. She just had to walk around the trench, which was akin to a pot hole, albeit larger, using whatever path she chose.

Plaintiff expresses concern about "graft[ing] onto the statute a special-aspects/effectively-unavoidable requirement, which has already been abandoned at common law in the premises-liability context."[35] But this is not a common law, premises liability claim. It is a contract claim for breach of a covenant that the common areas are fit for their intended use. The law is different. A contract is interpreted by examining its words. The covenant, or duty, in this case is determined by the plain meaning of the words, not the elements that are examined to determine whether a tort duty exists.[36]

The question is whether the parking lot was "'adapted or suited; appropriate" for its intended purposes of parking cars, getting to and from cars, and, in this case, getting to and from the dumpster. Michigan courts have correctly explained that the ability to avoid a defect on a parking lot or sidewalk is relevant to the issue of whether the common area is fit, as that term is defined in the dictionary, notwithstanding the presence of an isolated defect. MCL 554.139(1)(a) should be interpreted in accordance with the plain meaning of its terms, and the Court should not graft tort principles into its interpretation of the contractual covenants required by the statute.

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[35] Plaintiff Supplemental Brief at 29.

[36] In determining whether a duty exists, courts examine different variables, including foreseeability of the harm, existence of a relationship between the parties involved, and degree of certainty of injury, among others. *Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992).

Relatedly, the fact that Plaintiff seeks personal injury damages in this case should not change the analysis. If Plaintiff was seeking economic damages, e.g., abatement of rent, the question would be the same: was the parking lot unfit for its intended purpose? Was Plaintiff prevented from parking her vehicle? Was Plaintiff prevented from accessing her vehicle? Was Plaintiff prevented from accessing the dumpster? The answer to all of these questions should be "No," because a single, avoidable depression in a parking lot does not prevent Plaintiff from using the parking lot as it was intended.

Plus, it should also be kept in mind why the trench was there in the first place: Red Oak was in the process of performing maintenance on the parking lot. While the trench was present longer than desired – due to illness[37] – it was there only temporarily because of ongoing maintenance work.

CONCLUSIONS AND RELIEF REQUESTED

For the reasons discussed above, Defendant-Appellee Red Oak requests that this Court either deny the application for leave to appeal or affirm the Court of Appeals in all respects.

Respectfully submitted:

Date: August 8, 2025 By:

Daniel J. James (P75147)
WHEELER UPHAM, P.C.
Attorneys for Defendant-Appellee Red Oak

[37] Koch Dep Trans at 36, 45-46; Plaintiff Appx at 098a, 100a-101a.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 6,717 countable words. The document is set in Book Antiqua, and the text is in 12-point font with 18-point line spacing and 12 points of spacing between paragraphs.

Date: August 8, 2025 By: 

Daniel J. James (P75147)
WHEELER UPHAM, P.C.
Attorneys for Defendant-Appellee Red Oak