# Order

**Michigan Supreme Court**
**Lansing, Michigan**

October 3, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

164164

EDITA RAMIC,
Plaintiff-Appellant,

and

FAZLIJA SALI,
Plaintiff,

v

SC: 164164
COA: 354374
Macomb CC: 2019-000020-NO

BULLOCK ENTERPRISES, LLC, d/b/a
BRADFORD SQUARE APARTMENTS,
Defendant,

and

BRADFORD SQUARE CONDOMINIUM
ASSOCIATION,
Defendant-Appellee.

_____/

By order of July 1, 2022, the application for leave to appeal the February 1, 2022 judgment of the Court of Appeals was held in abeyance pending the decisions in *Walker v Hela Mgt, LLC* (Docket No. 163475), *Kandil-Elsayed v F & E Oil, Inc* (Docket No. 162907), *Pinsky v Kroger Co of Mich* (Docket No. 163430), and *Becker v Enterprise Leasing Co of Detroit LLC* (Docket No. 163702). On order of the Court, *Walker* having been dismissed by stipulation of the parties on December 19, 2022, *Becker* having been dismissed by stipulation of the parties on March 1, 2023, and *Kandil-Elsayed* and *Pinsky* having been decided on July 28, 2023, ___ Mich ___ (2023), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part II.C. of the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *Kandil-Elsayed* and *Pinsky*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

a0926

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 3, 2023

Clerk

# STATE OF MICHIGAN

# COURT OF APPEALS

EDITA RAMIC,

Plaintiff-Appellee,

and

FAZLIJA SALI,

Plaintiff,

v

BULLOCK ENTERPRISES, LLC, doing business as BRADFORD SQUARE APARTMENTS,

Defendant,

and

BRADFORD SQUARE CONDOMINIUM ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
February 1, 2022

No. 354374
Macomb Circuit Court
LC No. 2019-000020-NO

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

In this interlocutory appeal, defendant, Bradford Square Condominium Association (Bradford), appeals by leave granted the trial court's order denying Bradford's motion for summary disposition under MCR 2.116(C)(10) of plaintiff Edita Ramic's complaint against Bradford asserting negligence and liability under MCL 554.139. We reverse and remand for entry of judgment in favor of Bradford.

## I. FACTS

In October 2017, plaintiff Edita Ramic leased a condominium unit from Waldemar Liebich. Liebich owns the unit, which is located in a condominium complex owned by defendant Bullock Enterprises, LLC.[1] Defendant Bradford is a condominium association that was formed to manage the complex. On the evening of September 3, 2018, Ramic left the unit, which is located on the second floor of the complex, to retrieve her mail from her mailbox on the first floor of the complex. Ramic was wearing flip flops; when she reached the top of the stairs that were located in a common area of the building, she attempted to step down the first step but lost her footing and fell down the stairs, sustaining injuries. Ramic alleges that at the time she fell none of the lights in the stairway were operating, and the stairway was dark.[2] Ramic claims that the fall was not the result of tripping on either her flip flops or the carpet, but rather that the darkness caused her to lose her footing and fall as she stepped down the first step.

The common area of the building contains two stairways leading from the first floor to the second floor; the front stairway is farthest from Ramic's unit but closest to her mailbox, while the back stairway is closest to Ramic's unit. Ramic testified that at the time she fell, although none of the lights in the front stairway were operating, the back stairway had working lights and was illuminated. Ramic testified that nonetheless she chose to use the front stairway because it was the shortest route to the mailboxes, and also because she was concerned that the back stairway was not safe because the door by that stairway often was unlocked.

Plaintiffs initiated this action in the trial court against defendant Bullock Enterprises, LLC, and later amended the complaint to add Bradford as a defendant.[3] In the amended complaint, Ramic alleged that Bradford was negligent and breached its statutory duty under MCL 554.139. Bradford moved for summary disposition under MCR 2.116(C)(10), contending that it did not breach either a common law duty or a statutory duty. Bradford argued in part that Ramic's common law negligence claim failed because the condition in the stairway was open and obvious,

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[1] According to defendants' answer to plaintiffs' amended complaint, the condominium complex is owned by defendant Bullock Enterprises, LLC; Bradford is a condominium association that was formed to manage the complex. Bradford's motion for summary disposition asserted that Liebich owns the unit which Ramic leased, that Liebich is Ramic's landlord, that Liebich paid association dues to Bradford, and that Bradford had possession and control of the common areas of the condominium complex on the day in question. In her response to Bradford's motion, Ramic admits these assertions.

[2] Neighbors reported that at the time of Ramic's fall the lights in the front stairway were not working, that often the lights were completely burned out, and that their calls to report that the lights were not working received no response. After Ramic's fall, the property management company employed by Bradford to perform maintenance in the building denied receiving any work orders or complaints regarding the lighting in the building. Liebich asserted that he did not know about the lack of lighting before the accident and that on the morning of the accident he observed that all the lights in the front entrance of the building were working.

[3] Plaintiff Fazlija Sali, Ramic's partner, and defendant Bullock Enterprises were subsequently dismissed with prejudice by stipulation of the parties, and are not parties to this appeal.

no special aspects existed to make the stairway unreasonably dangerous, and Ramic could have avoided the alleged danger by using the back stairway. Bradford contended that Ramic's statutory claim failed because the stairway where plaintiff fell was fit for its intended use.

At the conclusion of the hearing on the motion, the trial court denied Bradford's motion for summary disposition, determining that genuine issues of material fact existed. The trial court stated:

> I'm going to deny this motion. It just seems to me that there is not a case directly on point, other than in dicta, which addresses this situation. And I believe that poor lighting by itself can be a dangerous condition if the jury believes it to be so. Almost all of the arguments presented by Defense are very persuasive arguments, but only in terms of a jury. Michigan law is, has been decided over the years to be very favorable to owners of premises. I think it started off with the fact that we get a lot of snow and ice, and so the Court of Appeals wisely said, hey, this is Michigan, people have to expect some problems when you live in a state that gets a lot of snow and ice that melts and warmth and cold spells. And so they rationalized our law to be consistent with the type of state that we live in and the weather that we have. And from that then it spread to all areas of premises liability, so that we now have the open and obvious doctrine. But essentially the open and obvious doctrine I believe, although I recognize that judges can and should enter a summary disposition if something is open and obvious and the plaintiff proceeded at his or her own risk. I understand that. But quintessentially the subjective determination if something was truly open and obvious and whether a, the premises are fit for the use for which they are intended, those are just jury questions about which reasonable minds can differ. And although Defense has come close to a summary disposition in this case I'm going to deny it, because if I granted it[,] it seems to me that I'm essentially taking away a question about which reasonable minds can differ from the finders of fact that should be deciding these things, namely a jury rather than me as a Circuit Judge. So that's my response and so the motion is denied.

The trial court thereafter entered its order denying Bradford's motion. This Court granted Bradford's application for leave to appeal the trial court's order. *Ramic v Bullock Enterprises, LLC*, unpublished order of the Court of Appeals, entered November 4, 2020 (Docket No. 354374).

## II. DISCUSSION

Bradford contends that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(10). Bradford argues that Ramic's claim under MCL 554.139 fails because there is no genuine issue of material fact that the stairway upon which Ramic fell was fit for its intended use, and that the open and obvious doctrine bars Ramic's common law negligence claim.

### A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). We also review de novo questions of statutory interpretation, *Vermilya v Delta College Bd of*

*Trustees*, 325 Mich App 416, 418; 925 NW2d 897 (2018), and the trial court's determination whether a duty exists. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *El-Khalil*, 504 Mich at 160. When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. We will find that a genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might disagree. *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018).

B. MCL 554.139

Bradford contends that Ramic's claim under MCL 554.139 fails because the stairway upon which Ramic fell was fit for its intended use. We conclude that Ramic's claim against Bradford under MCL 554.139 fails because Bradford is not a "lessor" under the statute. MCL 554.139(1) states:

> (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) imposes a duty upon a lessor or a licensor of residential premises. "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." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy." *Id*. at 425-426. If no lease exists between the plaintiff and the defendant, then the defendant is not a lessor, and no duty can be imposed under MCL 554.139(1). See *Francescutti v Fox Chase Condo Ass'n*, 312 Mich App 640, 642; 886 NW2d 891 (2015).

In *Francescutti*, this Court held that the owner of a condominium unit did not have a cause of action under MCL 554.139(1) against the condominium association for an injury allegedly arising from the condominium association's failure to maintain the common areas of the condominium development because the owner of the unit was not a lessee of the common areas, and the condominium association was not a lessor. *Francescutti*, 312 Mich App at 642. This Court reasoned that the plaintiff, as an owner of a unit in the condominium complex, had an ownership interest in, and the right to use, the common areas of the condominium complex; the defendant condominium association had not leased the common areas to the plaintiff, however, and was not a lessor under the statute. In accord, *Jeffrey-Moise v Williamsburg Towne Houses*

*Coop, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351813); slip op at 8 (defendant corporation operating a housing cooperative did not lease the common areas of the cooperative to the plaintiff, and therefore was not a lessor under MCL 554.139).

In this case, Liebich owns the condominium unit, which presumably includes an ownership interest in, or at least a right to use, the common areas of the complex. Liebich leased his unit to Ramic; the residential lease agreement identifies Liebich as the lessor of the residential unit and Ramic as the lessee. There is no evidence in the record that Bradford leased either the unit or the common areas to Ramic, or indeed, to Liebich. Because Bradford is not a lessor, MCL 554.139 does not impose any duty upon Bradford in this case. See *Francescutti*, 312 Mich App at 642. Accordingly, the trial court erred when it denied Bradford's motion for summary disposition of Ramic's claim under MCL 554.139.

## C. NEGLIGENCE

Bradford also moved for summary disposition of Ramic's negligence claim under MCR 2.116(C)(10) on the basis that any danger posed by the unlighted stairway was open and obvious. The trial court denied Bradford's motion for summary disposition, concluding that whether the open and obvious doctrine barred Ramic's negligence claim was a question for the jury. We disagree.

To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of those damages. *Composto v Albrecht*, 328 Mich App 496, 499; 938 NW2d 755 (2019). The threshold question in a negligence action is whether the defendant owed a legal duty to the plaintiff, *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004), which is a question of law to be decided by the court. *Hill*, 492 Mich at 659. In a negligence action, if the plaintiff does not establish that the defendant owed the plaintiff a duty, summary disposition is properly granted to the defendant.[4] *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 441; 569 NW2d 836 (1997).

Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff. *Id*. at 691-692. When a plaintiff alleges injuries arising from a dangerous condition on the land, the claim is one of premises liability rather than ordinary

[4] The dissent maintains that, viewing the evidence in the light most favorable to plaintiff, there was substantial evidence that defendant had not maintained the lights in the stairway; the dissent points to evidence that the lights had not been operating for weeks before plaintiff's fall and that defendant failed to address the complaints of the residents regarding the lights. The reasonableness of a defendant's conduct, however, is only relevant if the plaintiff has established that the defendant owed the plaintiff a duty. When, as in this case, the plaintiff fails to establish that the defendant owed the plaintiff a duty, summary disposition is properly granted without considering the reasonableness of the defendant's conduct. See *Halbrook*, 224 Mich App at 441.

negligence. *Id*. at 692. In this case, Ramic alleges that a condition of the premises, i.e., the dark stairway, constituted a dangerous condition on the property that gave rise to her injury. Because plaintiff's claim is based on Bradford's duty as the possessor of the building in which she fell, we treat Ramic's claim as one of premises liability. See *id*. at 692.

In a premises liability action, as in any negligence action, the plaintiff must establish the elements of negligence, *Goodwin v Northwest Michigan Fair Ass'n*, 325 Mich App 129, 157; 923 NW2d 894 (2018), but liability arises from the defendant's duty as an owner, possessor, or occupier of land. *Buhalis*, 296 Mich App at 692. The initial inquiry when analyzing a claim of premises liability is the duty owed by the possessor of the premises to a person entering the premises. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). The duty a possessor of land owes to a person who enters upon the land depends upon whether the visitor is classified as an invitee, a licensee, or a trespasser. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). An invitee is a person who enters upon the land of another by an invitation that carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises and to make the premises safe for the invitee's presence. *Id*. Here, the parties do not dispute that Ramic was an invitee, having entered upon the premises at the invitation of Liebich.

The possessor of land owes an invitee the duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises. *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328, 337; ___ NW2d ___ (2021); *Hoffner*, 492 Mich at 460. The possessor of the premises breaches that duty of care when he or she knows or should know of a dangerous condition on the premises of which the invitee is unaware, and fails to fix, guard against, or warn the invitee of the defect. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8; 890 NW2d 344 (2016).

A premises possessor is not an absolute insurer of the safety of an invitee, however, and accordingly, the premises possessor's duty does not extend to open and obvious dangers. *Estate of Livings*, 507 Mich at 337; *Jeffrey-Moise*, ___ Mich App at ___; slip op at 6. The open and obvious doctrine is predicated on the strong public policy that people should take reasonable care for their own safety. *Buhalis*, 296 Mich App at 693-694. A premises possessor is thus not obligated to take extraordinary measures to keep people safe from reasonably anticipated risks, and does not owe a duty to protect from, or warn of, dangers that are open and obvious because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461.

Whether a dangerous condition is open and obvious "depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. This is an objective test in which the court considers "the objective nature of the conditions of the premises at issue." *Id*., quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 524; 629 NW2d 384 (2001). The court does not consider whether a particular plaintiff should have realized that the condition was dangerous, but rather whether an average person in that position would have foreseen the danger. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). Although a question of fact may arise regarding the openness and obviousness of a condition, see *Estate of Livings*, 507 Mich at 337, the open and obvious doctrine is not an exception to the duty owed by the premises possessor, but instead is an integral part of

that duty; thus, the application of the open and obvious doctrine is part of the question of duty that is a question of law for the court to decide. *Hoffner*, 492 Mich at 476. That is, because the open and obvious doctrine cuts off liability as a matter of law, it is for the trial court to decide and is not a question of fact for the jury. *Id*. at 477.

A narrow exception to the open and obvious doctrine exists when a "special aspect" of the open and obvious condition makes the risk unreasonable, thereby obligating the premises possessor to take reasonable steps to protect invitees from unreasonable risk of harm. *Id*. at 461. A special aspect of an open and obvious condition is found if the danger is effectively unavoidable, or if it is unreasonably dangerous. *Estate of Livings*, 507 Mich at 337. A condition that is common or avoidable is not considered uniquely dangerous. *Hoffner*, 492 Mich at 463. Absent a special aspect of the open and obvious condition, the duty of a premises owner or possessor does not extend to open and obvious dangers.[5] *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 285; 933 NW2d 732 (2019).

In this case, Ramic alleges that the darkness itself made the otherwise unhazardous stairway hazardous by making it hard for Ramic to see where she was stepping. This Court has held that darkness may conceal a hazard that might otherwise have been open and obvious. See, e.g., *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 72 (2000). That is, a claim of premises liability has been permitted to proceed on the basis that poor lighting concealed a hazard. By contrast, inadequate lighting itself has been held to constitute an open and obvious condition that an invitee may reasonably be expected to discover. In *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), the plaintiff alleged that his injuries were caused by inadequate lighting in a hockey rink. Affirming the trial court's order granting summary disposition in favor of the defendants, the Court stated:

> [H]ere there was nothing unusual about the inadequate lighting in the hockey rink to cause such a duty to remain. Plaintiff was an adult and an experienced hockey player. The lighting in the rink is alleged to have been consistently inadequate, not subject to unexpected fluctuations or other changes. There was nothing to prevent plaintiff from realizing that the rink was inadequately lighted. Nor was there any chance that he would forget the potentially hazardous condition, because the

[5] The dissent asserts that the dark stairway had the "special aspect" of being unreasonably dangerous, thus giving rise to liability regardless of the openness and obviousness of the condition. The dissent concedes that neither darkness alone nor a properly constructed stairway alone is a hazard, but concludes that a stairway in the darkness is a hazard, or at least it becomes a question for the jury as to whether it is a hazard. But although this Court has held that darkness may conceal a hazard, a hazard is not created simply because the darkness makes it difficult to navigate an otherwise unhazardous route. To so conclude would be to find that anything and everything is a hazard if concealed in darkness, i.e., that darkness is a hazard. Further, as discussed, the open and obvious doctrine is not an exception to the duty owed by the premises possessor, but instead is an integral part of that duty; thus, the application of the open and obvious doctrine, including special aspects, is a question of law for the court to decide and not a question for the jury. See *Hoffner*, 492 Mich at 476-477.

> condition was constantly before him. Finally, plaintiff was not compelled to use the rink for work, or profit, or any other overriding or substantial motivation. He chose to participate in a dangerous sport under conditions that he knew to be dangerous. [*Id*. at 144.]

In this case, Ramic alleged that the darkness alone caused her to fall on the steps; she does not allege that the darkness concealed some other hazardous condition of the steps. She also testified that she recognized that the front stairway was dark but nonetheless chose to use that stairway instead of the lighted back stairway. Ramic does not allege anything unusual about the darkness itself, and in fact, Ramic asserts that the stairway consistently was unlighted. We conclude that darkness is a condition well known to the average individual of ordinary intelligence, as is the potential for hazard caused by darkness. We therefore conclude that in the circumstances of this case, the darkness caused by the inadequate lighting in the stairway was an open and obvious condition. In so concluding, we reject Ramic's claim that the lack of illumination constituted a special aspect that removed the condition from the scope of the open and obvious doctrine; rather, the condition was neither unreasonably dangerous nor unavoidable. The standard for whether a condition is effectively unavoidable is that the plaintiff "for all practical purposes, [is] *required* or *compelled* to confront a dangerous hazard." *Estate of Livings*, 507 Mich at 338, quoting *Hoffner*, 492 Mich at 463. When the plaintiff has a choice whether to confront a hazard, the hazard is neither unavoidable nor effectively unavoidable. *Id*. A general interest in using the premises, or even a contractual right to do so, is not enough to make a hazard unavoidable. *Hoffner*, 492 Mich at 473-474 (the plaintiff's desire to use a gym where she had a membership did not make the icy entrance an unavoidable hazard).

Here, the trial court determined that a question of fact existed whether the danger posed by the dimly lit stairwell was effectively unavoidable because the other stairwell was perceived by Ramic to be dangerous as well. The danger, according to Ramic, was the threat of trespassers who had potential access via a door that was often left unlocked. However, Ramic also testified that the door at the bottom of the front stairway also was left unlocked. Moreover, since both doors were on the first floor, any intruder who entered from the back would have access to the front. In determining whether a condition is open and obvious, we consider the perspective of the average person, not the particular perspective of the plaintiff in a given case. *Estate of Livings*, 507 Mich at 346. We conclude that an average person would perceive the potential danger of traversing a darkened stairway; that same average person, if concerned that a trespasser was lurking downstairs, would be unlikely to forgo a lighted stairway and instead venture down a darkened stairway at night for the purpose of retrieving one's mail. Accordingly, the open and obvious condition was not unavoidable. Because the open and obvious doctrine is not an exception to the duty owed by the premises possessor, but instead is an integral part of that duty, the application of the open and obvious doctrine is part of the question of duty that is a question of law for the court to decide. *Hoffner*, 492 Mich App at 476. The trial court therefore erred by determining that an issue of fact existed regarding the open and obvious nature of the darkness.

Reversed and remanded for entry of judgment in favor of Bradford. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael F. Gadola

# STATE OF MICHIGAN

# COURT OF APPEALS

EDITA RAMIC,

Plaintiff-Appellee,

and

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Plaintiff,

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BULLOCK ENTERPRISES, LLC, doing business as BRADFORD SQUARE APARTMENTS,

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UNPUBLISHED
February 1, 2022

No. 354374
Macomb Circuit Court
LC No. 2019-000020-NO

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent. The majority errs in several respects. First, it fails to follow the fundamental principle that in a motion for summary disposition, the evidence is to be taken in the light most favorable to the non-moving party. Second, it errs in concluding that the open and obvious doctrine bars plaintiff's common law claim despite the fact that the dangerous condition in this case is not subject to that doctrine because it presented a high likelihood of severe injury. Third, it erroneously concludes that defendant is not subject to the duty defined by MCL 554.139 despite the fact that plaintiff was a lessee. Fourth, the majority erroneously concludes that, even though condominium associations have a contractual duty to maintain the common areas of the building, they violate no legal duty by disregarding repeated complaints that the lights in the

building's common areas were not working, leaving a stairway from the second to the first floor in darkness.

## I. FACTS

Analysis of this case should begin with a review of the facts and it should go without saying that when we review motions under MCR 2.116(C)(10), we must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). Despite this principle, the majority offers virtually no description of the evidence proffered by plaintiff, let alone review it in the most favorable light.

The evidence in support of plaintiff's cause of action is as follows. Plaintiff Edita Ramic lives on the second floor of a building housing eight units in a large, multi-building condominium project. She fell down a dark, unlit flight of 12 stairs leading from the second to the first floor and suffered significant injury. The project was managed by defendant condominium association, which had the responsibility to repair and maintain the common areas such as hallways and stairs. Residents were not permitted to make alterations to the common areas.

Plaintiff testified that when taking her first step down, she lost her footing because she was unable to see the location of the next step. Defendant disputes these factual claims, asserting that most of the lights were working and so the stairway was not dark and that they did not receive any complaints about the lack of lighting prior to plaintiff's injury.

In support of her version of events, plaintiff presents affidavits from several residents of the building attesting to the condition of the lighting and the complaints they made prior to plaintiff's fall.[1] Resident Anne-Marie Hickey averred:

> On the evening of September 3rd, 2018 my neighbor Edita Ramic[] fell down the stairs while heading to retrieve her mail. At the time of her fall there were no working lights in the common area of our building, 34501. The lights have been a constant issue in our building, always lights burnt out and most of the time complete darkness. I have been a resident of Bradford Square 35401 since 2006 and grounds has always been a problem, especially the lights. We consistently live in the dark for months at a time if not longer. It is a recurring problem. Due to this faulty upkeep of the lights in building 35401 Edita missed a step due to the darkness and fell down the whole flight of stairs. Other neighbors who live on the 2nd floor have had near misses of falling as well.

[1] All of these residents witnessed plaintiff laying on the ground after she fell down the flight of 12 stairs. Hickey specifically recalled that it appeared that plaintiff had "stopped breathing" and that "her husband performed CPR on her guided by the 911 operator."

According to a statement given by another neighbor, Alexis Mork:

> The hallway lights in the building had been out for about 2 months. . . . [Plaintiff's fall down the stairs] could have been avoided if our building maintenance had been well maintained. To add injury to insult, when the paramedics arrived they rudely asked, "Why no one . . . turn a light on?"

A third resident, Raydine Trulove, attested as follows:

> 5. At [the time of plaintiff's fall], the light had been burnt out in the common area and it was too dark to see the stairs.
>
> 6. Prior to that date, . . . I had contacted maintenance at Bradford Square Apartment, specifically, [Kevin Goodrich,] to inform him of the light being out in the hallway and that it was too dark to even see the stairs.
>
> 7. Maintenance never responded to my request to repair or replace the light.
>
> 8. Based upon myself previously requesting maintenance to repair or replace the light in the stairway, I can attest to the fact that the apartment complex had notice of this dangerous condition.

Truelove went on to explain that she called to complain about the lights on August 14, 2018, more than two weeks before the injury to plaintiff. Further, plaintiff's partner, Fazlija Salia, attested:

> 3. Prior to September 3, 2018[,] the lights had been burnt out for months in the common area of our building and at night it was too dark to see the stairs.
>
> 4. Prior to that date I had contacted our landlord for our unit, Wally Liebich, and informed him that the lights were out and that it posed a dangerous situation. He said he would let maintenance people for the building know. When the lighting problem was not taken care of, I again complained to Mr. Liebich who said he had told someone from the maintenance department about the problem, but they had not taken care of it.
>
> 5. No one from maintenance ever responded to my request to repair or replace the lights.

The condominium documents designate defendant as the entity responsible for maintaining the project's common areas. However, defendant had no person designated to inspect the common areas or to repair them as needed. It did not employ a maintenance person. The president of the condominium association is Dave Bullock and in effect defendant association is wholly controlled

by Bullock Enterprises,[2] which also owns several adjacent non-condominium apartment buildings as well as many of the condominium units in the project.[3]

Bullock testified that he never personally inspected or maintained the common areas in the condominium. He testified that maintenance of the common areas would have been performed by JBC, a management company that defendant had contracted with since 2011. But the owner of JBC, Jeffrey Podolski, disagreed, testifying that his company was not contracted to maintain or repair the common areas, that they never performed inspections or maintenance or even had a person on site, and that he was only in the building once a year at most. He testified that per defendant's direction, JBC's responsibility for the common areas was limited to passing along complaints they received from tenants to Bullock and then, upon direction from Bullock, hiring outside contractors to perform repairs if Bullock directed them to do so. According to Podolski, Bullock and his wife "have on-site folks, whether it's [the Bullocks] or their maintenance man, Kevin Goodrich, to perform inspections." He explained that JBC has no employees to perform maintenance work, and when asked specifically about light bulb replacement he stated that such work was not within its contract.[4] He testified that it was his understanding that Goodrich "was conducting regular inspections of these buildings." This was consistent with Bullock's description of Goodrich as "my maintenance manager." However, Goodrich was the "maintenance man" only for the apartment buildings, not the condominium project. He received a paycheck only from Bullock Enterprises, not defendant.

Although Bullock and Podolski both stated they relied exclusively on Goodrich to perform inspections and repairs on defendant's behalf, Goodrich testified that: he never performed any inspections of the condominium buildings; it was not his job to do so; he would only perform maintenance in the condominium buildings if directed to do so by Bullock; and he did not receive payment from the association. He testified that "[i]t was not my responsibility to do inspections of the hallways" and that it was his understanding that inspection of the common areas "would be the tenants' responsibility." He also testified that "it [was] not mine or Bullock Enterprises [job] to deal with the common areas or hallways." He was paid by Bullock Enterprises to do maintenance work in the apartment building and by JBC to do clean up on the outside grounds. He also conceded that he had not even been inside the building for a month or two before plaintiff's fall and that even if a light was out in a condominium hallway, he would not replace it unless he was directed to do so by Bullock.

Thus, there is substantial evidence to support plaintiff's claim that defendant did not inspect or maintain the common areas and that no individual had the responsibility to do so on defendant's

[2] Bullock Enterprises owned 46 out of the 72 condominium units, and Bullock testified that the association "board is really controlled by Bullock Enterprises" and that there are no regular meetings of the board.

[3] According to Kevin Goodrich, there was a total of 16 buildings between the condominium and the apartments.

[4] He also testified that he did not attend defendant's meetings.

behalf—or at least that no one knew that it was their responsibility. Bullock, Goodrich and Podolski each asserted that it was someone else's job, not theirs.

In sum, the evidence taken in the light most favorable to plaintiff would establish that the lights were out in the stairway for weeks, that defendant never inspected the common areas and that it ignored repeated complaints that there were no working lights in common areas including in a lengthy stairway. In spite of this, the majority would hold that defendant's wholesale failure to inspect and maintain the common areas violates *no* legal duty, indeed that there is no duty to violate. I cannot agree and so dissent.

## II. ANALYSIS

Plaintiff has raised two grounds for liability. First, that defendant failed to meet its duty under premises liability common law because an unlit stairway is not reasonably safe. Defendant responds, and the majority agrees, that defendant has no such duty because this condition was open and obvious. While I agree that the dangerous condition presented by the unlit stairs was open and obvious, I would conclude that there is a question of fact whether special aspects exist making the condition unreasonably dangerous. Second, plaintiff alleges that defendant failed to comply with MCL 554.139, which requires that common areas in a leased or licensed residential premises be "fit for the use intended by the parties." I agree that caselaw holds that this provision only creates a duty to rental landlords, but I would conclude that under the facts of this case, defendant stands in the shoes of the condominium unit owner that rented to plaintiff.

### A. COMMON LAW DUTY

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 285; 933 NW2d 732 (2019) (quotation marks and citation omitted). The duty owed by the defendant's depends on the plaintiff's status, and in this case there is no dispute that plaintiff was an invitee. "[P]remises possessor owes a duty to undertake reasonable efforts to make its premises reasonably safe for its invitees." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008) (quotation marks and citations omitted).

To the extent that the majority concludes that an unlit, darkened interior stairway is reasonably safe, I disagree.[5] The majority reaches this conclusion by dividing the condition into two separate aspects and then analyzes each without consideration of the dangerousness of the actual hazard. This is error. The hazard is not merely a "staircase" nor merely "darkness." The

[5] The majority's analysis indicates that there was no hazard or dangerous condition, but then grants summary disposition to defendant on the basis that the condition was open and obvious. If there is no dangerous condition, however, the open and obvious condition does not come into play. See *Prebenda v Tartaglia*, 245 Mich App 168, 170; 627 NW2d 610 (2001) ("If a condition is not dangerous, it is senseless to consider whether that condition is open and obvious."). Thus, the majority's holding is unclear.

hazard in this case is a dark, unlighted 12-step staircase. By dividing this single hazard into two, the majority manages to pronounce it safe. But the reality is that a long interior staircase that has no light is not reasonably safe—at a minimum, a jury could readily and reasonably find that it is not.

I agree with the majority that the darkness in and of itself is not a hazard. I also agree that a properly constructed stairway is not in and of itself a hazard. However, when one puts them together they create a single hazard—a stairway to be traversed without being able to adequately see the individual steps.[6]

The majority's conclusion is inconsistent with the foundational decisions in the open and obvious jurisprudence. As the Supreme Court observed in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995), a premises owner has no duty "to make ordinary stairs 'foolproof.' " However, *Bertrand* goes on to recognize that "where there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Id*. (citation omitted). "If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." *Id*. See also *Abke v Vandenberg*, 239 Mich App 359, 363; 608 NW2d 73 (2000) ("[E]ven if the condition that caused plaintiff's fall had been open and obvious, the trial court would still have been obligated to deny defendant's motions if there existed a question of fact regarding whether the condition was unreasonably dangerous."). Indeed, in *Bertrand*, the Supreme Court reversed a grant of summary disposition when the plaintiff fell from a single step because "one can reasonably argue that the defendant should have reasonably anticipated a congested pedestrian traffic pattern causing an invitee to fall off the step" and therefore the Court could not "find as a matter of law that the risk of harm was reasonable." *Bertrand*, 449 Mich at 624. The Court concluded that

> because a genuine issue existed regarding whether the defendant breached its duty to protect the plaintiff against an unreasonable risk of harm, in spite of the obviousness or of the plaintiff's knowledge of the danger, summary disposition was inappropriate. Whether the risk of harm was unreasonable and whether the defendant breached its duty to exercise reasonable care by failing to remedy the danger are issues for the jury to consider. [*Id*. at 624-625.]

More recently, Judge GLEICHER addressed the issue in her concurrence in *Blackwell v Franchi (On Remand)*, 327 Mich App 354, 268; 933 NW2d 762 (2019) (GLEICHER, J., concurring):

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[6] The cases cited by the majority are inapposite. In *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 72 (2000), the plaintiff had fallen off a loading dock that he did not see due to a lack of lighting in the premises. This Court affirmed *denial* of a directed verdict motion and a JNOV motion, each of which was based on an open and obvious argument. In *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), the only alleged hazard was the darkness; there was no claim that the defendant was responsible for the trajectory of the hockey puck that struck the plaintiff. And of course, *Singerman* involved the sui generis circumstance of plaintiff's participation in a fast moving hockey game.

> It is certainly true that a normal, well-lit, eight-inch step is not objectively dangerous; objectively, the likelihood of injury for a person walking down a *visible*, everyday step approaches zero. But an invisible eight-inch step poses a different risk. [Emphasis added.]

In this case, the existence of the *stairway* was visible to plaintiff—she was trying to use the stairs to go to a lower floor of the building. However, the individual steps were not. She testified, "As I started walking down, I couldn't see the step. The next thing I know. . . my boyfriend was there waking me [at the bottom of the staircase]." And as already noted, three other residents described the situation respectively as "complete darkness," "too dark to even see the stairs" and "at night it was too dark to see the stairs." The darkness rendering the individual steps invisible plainly falls within the Supreme Court's discussion of special aspects in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 525; 629 NW2d 384 (2001):

> Simply put, there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition. Indeed, it seems obvious to us that if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous. We cannot imagine an open and obvious condition that is unreasonably dangerous, but lacks special aspects making it so.

In this case there is both a special aspect—the inability to see the steps due to the darkness—as well as the fact that if a person falls down the long stairway as a result there is a significant likelihood of severe harm. *Lugo* held that "special aspects that give rise to a uniquely high likelihood of harm or severity of harm[7] if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519.

Defendant points out that there are two stairways in the building and that plaintiff does claim that the other stairway was dark. Because plaintiff had an alternative means of getting to the first floor, defendant argues no exception to the open and obvious doctrine applies. However, the "special aspects" exception is wholly independent from the "no other alternative path" exception. Thus, regardless of the existence of a second stairway, the stairway in question, which remained open for use, presented a high likelihood of harm and it also presented a likelihood that the resultant harm would be severe. In this circumstance, defendant has violated its duty even if plaintiff's decision to use the staircase was unreasonable. Absent application of the open and

[7] The Supreme Court used the example of a thirty-foot unguarded pit in the middle of a parking lot. *Lugo*, 464 Mich at 518. How it came to select 30 feet remains unknown and no evidence was cited in support, but one need merely stand at the top of an unlit 12-step stairway to recognize that it presents both a high likelihood of harm and that such harm could be severe, either of which constitute special aspects. While not 30 feet, a fall of down a long flight of steps cannot be compared to a fall while walking on a flat surface as is typically seen with trip-and-fall and slip-and-fall cases.

obvious doctrine, any unreasonable action by the plaintiff must be considered as a basis for comparative negligence and not the elimination of the duty to change the light bulbs.

In addition, plaintiff testified that she chose the front stairway because the door at the back of the building was routinely left unlocked and she feared that an intruder could be waiting at the bottom of those stairs. In other words, she preferred to face the risk of the darkened stairway to the risk of assault.[8] One can argue her choice was unwise or even unreasonable, particularly in retrospect. But that is a determination for the factfinder.

B. MCL 554.139

The majority also concludes that defendant is not subject to MCL 554.139(1), which provides:

> 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.

The majority concludes that this statute mandating maintenance of common areas does not apply here, concluding that it applies only to common areas of multi-unit premises that are leased by the owner. I recognize that in *Francescutti v Fox Chase Condominium Ass'n*, 312 Mich App 640, 642; 886 NW2d 891 (2015), this Court concluded that MCL 559.139 did not apply to condominiums because it applies only to "leases or licenses of residential premises." However, in this case, the condominium documents allow unit owners to rent out their units, and plaintiff was a tenant and resided in the condominium unit pursuant to a lease in which the unit owner was the landlord. Since unit owners are barred from making changes to the common areas, and they lease their premises with defendant's permission, it is clear that—at least as to common areas—it is defendant that is in the role of landlord and so should have to comply with MCL 559.139 as to those who lease rather than own the units.[9] Moreover, MCL 559.160 demonstrates that as to the common areas, condominium associations are subject to suit by anyone regarding the condition of the common areas:

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[8] The majority opines that the risk of an intruder was the same whatever stairway she used. There is no evidence that that is the case and I am not certain why a panel of three judges are better positioned to make that determination than a jury. And whether and to what degree plaintiff was comparatively negligent in making that choice is certainly for the jury.

[9] Even if defendant is not a lessor as to plaintiff, it may fairly be described as a licensor as it impliedly gave plaintiff permission to reside in the unit and use the common areas. The Supreme Court has recently granted oral argument on an application to consider the definition of "licensee" under MCL 559.139 and whether a licensee must enter into a contract with the licensor for the statute to apply. *Walker v Hela Mgt, LLC*, ___ Mich ___ (2021) (Docket No. 163475).

> Actions on behalf of and against the co-owners shall be brought in the name of the association of co-owners. The association of co-owners may assert, defend, or settle claims on behalf of all co-owners in connection with the common elements of the condominium project.

As for whether the darkened stairway was "fit for its intended purpose," it is clear that it was not for the reasons discussed above, i.e., an interior staircase with no lighting is not fit for its intended purpose which is not merely to permit transit between floors but to do so in a manner that is reasonably safe.[10] At a minimum, there is a question of fact as to its fitness.

The determination of whether a common area is fit for its intended purpose is not an issue of law. It is an issue of fact. This was made clear in *Allison v AEW Capital Management, LLP*, 481 Mich 419; 751 NW2d 8 (2008). There, the question was whether a parking lot with one to two inches of snow on it was fit for its intended use as a parking lot. The Court did not hold that conditions of snow or ice could never render a parking lot unfit; rather it held pursuant to MCR 2.116(C)(10) that "there could not be reasonable differences of opinion" regarding whether this level of natural accumulation rendered the parking lot unfit. *Id*. at 430. It recognized, however, that even a natural accumulation could render a parking lot unfit were there "much more exigent circumstances than those obtaining in this case." *Id*.[11]

*Allison* does not mandate a finding that a dark interior staircase is fit for use as a stairway. Moreover, the failure to replace or repair light bulbs is neither a "transitory condition" nor a "natural" occurrence in the manner that winter precipitation is. The burnt-out lights did not naturally fall from the sky, they were burnt out because the owner failed to maintain them. Further the absence of light was not transient. Burnt-out or inoperative lights will not repair or replace themselves (unlike snow which will melt) and until the owner replaces them, the condition will continue indefinitely. In other words, a reasonable person could readily conclude that a long unlit and dark interior stairway represented the kind of "exigent circumstances" that the Court concluded was not present by a parking lot with a modest, transient and natural accumulation of snow on a parking lot.

Further, in *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124; 782 NW2d 800 (2010), this Court held that summary disposition was properly denied in a case based on MCL 554.139 because the common area involved was a staircase. And it so held even though the staircase was outside and the alleged unfitness was due to a natural accumulation of ice. See *id.*

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[10] Ironically, defendant argues that it was unreasonable for plaintiff to have used the staircase while simultaneously arguing that it was reasonably fit for use. Plaintiff's position does not suffer from the same contradiction. She argues that the staircase was not reasonably fit and that she may be assessed comparative negligence for any unreasonable action.

[11] The significance of the limited scope of the holding was demonstrated in the concurrence of Justice CORRIGAN, who would have held that the statute provides no protection "against transient conditions such as ice or snow" regardless of severity. *Allison*, 481 Mich at 440 (CORRIGAN, J., concurring).

at 132. Thus, the only published caselaw dealing with an allegedly unfit staircase held that summary disposition should not be granted on facts far closer to *Allison* than are present here.

## III. CONCLUSION

As to the common law duty, I would conclude that (1) defendant had a duty to keep the common areas of the condominium project reasonably safe; (2) that the nature of the dangerous condition and its special aspects exempts the case from the open and obvious doctrine or at least creates a question of fact on that issue; and (3) that whether that duty was violated is a question for the factfinder. As to MCL 554.139, I would conclude: (1) that defendant stands in the shoes of the unit owner as landlord to plaintiff and so must comply with the statute; and (2) that the question whether the staircase was fit for its intended purpose is one for the factfinder.

For these reasons I would affirm the denial of summary disposition and remand for further proceedings. Accordingly, I respectfully dissent.

/s/ Douglas B. Shapiro