

EVERYBODY LOVES A LANDLORD: APPLYING THE STATUTORY DUTIES OF A  
LANDLORD TO CONDOMINIUM ASSOCIATIONS

By  
Lauren Russo

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Professor Kathleen Payne  
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## INTRODUCTION

Danielle and Anne are two life-long friends who live in two developments in the same small city. Danielle lives in Loon’s Lake apartments, while Anne moved into the Paradise Estates, the condominium<sup>1</sup> development across town. One particularly harsh winter, a faulty downspout causes an accumulation of ice at Loon’s Lake and Danielle slips and falls on it after a day at work, fracturing her back. While running to her car to help Danielle, Anne falls on an uneven patch of sidewalk at Paradise Estates, caused by improper drainage of the ground and breaks her arm. Under Michigan Compiled Law § 554.139(1), Danielle would be able to sue her landlord<sup>2</sup> for failure to keep the common areas in a state reasonably fit for the use intended by the parties.<sup>3</sup> However, Anne might not be able to recover for her injuries under the implied covenant theory, as the Michigan courts have not determined whether the statutory duties of M.C.L. § 554.139(1) also apply to condominium associations.

The statutory duties outlined in M.C.L. § 554.139(1) should apply to condominium associations as well as landlords because condominium associations control the common areas, are in the best position to maintain the common areas of the condominium development, and condominium owners pay maintenance fees for the use of those common areas. Part I of this Comment explores the development of common law duties owed by land possessor<sup>4</sup>, while Part II outlines the statutory duties owed by landlords under M.C.L. § 554.139 and the state of

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<sup>1</sup> Condominium projects are generally “multi-unit premises each of whose unit . . . owner enjoys exclusive ownership of his individual unit . . . holding a fee simple title thereto while retaining an undivided interest, as a tenant in common in common facilities and areas of the building and ground which are used by all the residents.” Bradford Sqaure Condo. Ass’n, Inc., v. Miller 57 S.E.2d 405, 409 (Ga. Ct. App. 2002).

<sup>2</sup> For the purposes of this Comment, the words “landlord,” and “lessor” are sometimes used interchangeably, as are the words “tenant” and “lessee.”

<sup>3</sup> See M.C.L. § 554.139 (2010); Benton v. Dart Props., 715 N.W.2d 335, 337 (Mich. Ct. App. 2006).

<sup>4</sup> See *discussion infra* Part I.

premises liability law in Michigan.<sup>5</sup> Part III examines the law in other jurisdictions.<sup>6</sup> Part IV asserts that condominium associations are in the best position to assume responsibility for maintenance of common areas,<sup>7</sup> while Part V demonstrates how applying similar statutory duties has worked in other jurisdictions.<sup>8</sup> The Comment concludes by stating that the statutory duties of M.C.L. § 554.139 should be applied to condominium associations because such associations are in the best position to maintain the common areas.

#### I. A QUESTION OF STATUS: THE COMMON LAW DUTIES OWED BY LAND POSSESSORS

Before any statutory duties were applied to landlords—or condominium associations—common law duties owed by land possessors developed with courts prescribing certain standards of care owed by a landowner to visitors of the land. These standards of care are referred to as duties. A “legal duty is essentially an obligation recognized by law which requires an actor to conform to a certain standard of conduct for the protection of others against unreasonable harm.”<sup>9</sup> At common law, no duty existed to protect individuals from the conduct of others.<sup>10</sup> However, under current Michigan law, landowners owe a duty of care to visitors to their land.<sup>11</sup> Which duty is owed to whom depends on the individual’s relationship to the landowner.<sup>12</sup> The question of what duty is owed, if any, for the court to decide as a matter of law.<sup>13</sup> The classic classifications, trespassers, licensees, and invitees are familiar to anyone who has passed their first year torts class. Over the years, Michigan courts—and other courts—have outlined the

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<sup>5</sup> See discussion *infra* Part II.

<sup>6</sup> See discussion *infra* Part III.

<sup>7</sup> See discussion *infra* Part IV.

<sup>8</sup> See discussion *infra* Part V.

<sup>9</sup> Swartz v. Huffmaster Alarms Sys., Inc. 377 N.W.2d 393, 395 (Mich. Ct. App. 1985).

<sup>10</sup> Duvall v. Goldin, 362 N.W.2d 275, 350-51 (Mich. Ct. App. 1984).

<sup>11</sup> See, e.g., Swartz, 377 N.W.2d at 395.

<sup>12</sup> *Id.*

<sup>13</sup> Moning v. Alfonso, 254 N.W.2d 759 (Mich. 1977). Assessing whether a duty should be imposed “is based on a balancing of the societal interest involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence and the relationship between the parties.” Swartz, 377 N.W.2d at 395.

standard of care owed by a landlord to his or her tenants. The question of what duty is owed by the land possessor is a very important one, as a plaintiff's success on a cause of action can often depend on how the court classifies them, and thus, what duty the landowner owed to the plaintiff.<sup>14</sup>

#### A. The "Classics:" Trespassers, Licensees, and Invitees

Michigan law recognizes the three common-law classifications for persons entering the land of another: trespassers, licensees, and invitees.<sup>15</sup> The duties owed to trespassers, licensees, and invitees vary across a continuum with the highest duty owed to the invitees and the lowest to trespassers, with the duty owed to licensees falling somewhere in between.<sup>16</sup> A trespasser is "one who enters upon another's land, without the landowner's consent."<sup>17</sup> Trespassers are not necessarily individuals entering the land for a sinister purpose; in fact, Michigan courts have held that children riding their bicycles through another person's land may be properly classified as trespassers.<sup>18</sup> While the landowner does not owe a high duty to the trespasser, he or she must not injure the trespasser through wanton or willful conduct.<sup>19</sup> However, if the landowner is aware of the trespasser's presence, he or she must use ordinary caution to refrain from injuring those

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<sup>14</sup> See, e.g., *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 90-91 (Mich. 2000). The Michigan Supreme Court granted leave to appeal to determine whether a visitor to a church was properly classified as a licensee, or an invitee. *Id.* At the trial level, the jury was instructed as to the lower duty owed to licensees. *Id.* The plaintiff appealed as of right, arguing that she should be properly classified as an invitee, and that the church owed her the higher duty. *Id.* The Michigan Court of Appeals agreed that the plaintiff was an invitee and reversed the trial court's verdict and remanded for a new trial. *Id.* The Michigan Supreme Court, in a five-to-two opinion, reversed the appellate court, holding that plaintiff was properly classified as an invitee, and reinstated the trial court's verdict for the defendant church. *Id.*

<sup>15</sup> *James v. Alberts*, 626 N.W.2d 158, 162 (Mich. 2001).

<sup>16</sup> See, e.g., *Id.*; *Pippin v. Atallah*, 626 N.W.2d 911, 915 (Mich. Ct. App. 2001) (holding that a landowner must refrain from injuring a trespasser willfully or wantonly); *White v. Badalamenti*, 505 N.W.2d 8, 9 (Mich. Ct. App. 1993) (holding that a landowner has a duty to protect or warn licensees against unreasonable risk of harm that licensee could not reasonably discover if the landowner has reason to know of it); *Kroll v. Katz*, 132 N.W.2d 27, 31 (Mich. 1990) (holding that possessor of land must keep the premises reasonably safe for the use of his or her invitees).

<sup>17</sup> *James*, 626 N.W.2d at 162.

<sup>18</sup> See *Pippin*, 626 N.W.2d at 915.

<sup>19</sup> *Id.*

trespassers through active negligence—which includes action or conduct.<sup>20</sup> Though the duty owed to trespassers is not high, landowners are not immune from liability for injuries suffered by trespassers.<sup>21</sup> The duty owed to licensees differs slightly from that owed to trespassers.

The duty owed to licensees is higher than the duty owed to trespassers, though not by much.<sup>22</sup> A licensee is defined as a person who enters the land of another with the landowner's consent.<sup>23</sup> While the licensee is on the premises with the landowner's consent, the licensee is on the property for a "personal unshared benefit," and the owner "merely tolerate[s] the licensee's presence."<sup>24</sup> The typical example of a licensee is a social guest, who does not bestow upon the landowner a "tangible benefit."<sup>25</sup> A landowner must warn licensees of any hidden dangers on the property if the landowner knows or has reason to know of those dangers.<sup>26</sup> The landowner owes the licensee no duty as to open and obvious dangers.<sup>27</sup> Additionally, the landowner does

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<sup>20</sup> *Pippin*, 626 N.W. at 915-16. *See also* *Nielsen v. Henry H. Stevens, Inc.*, 101 N.W.2d 284, 286 (Mich. 1960). A landowner who knows, or should know that trespassers frequently enter upon an area of their land is liable for failure to conduct an activity that involves "a risk of death or serious bodily harm with reasonable care for their safety." *Id.*

<sup>21</sup> *See supra* notes 19-20 and accompanying text.

<sup>22</sup> *Compare* *Doran v. Combs*, 354 N.W.2d 804, 805 (Mich. Ct. App. 1984) ("A property owner's liability to a licensee extends *only* (1) to liability for injuries caused by conditions the owner knows of and realizes involve an unreasonable risk of harm, (2) where the owner fails to exercise reasonable care to make the conditions safe or warn the licensee of the conditions or risks, and (3) where the licensee does not know or have reason to know of the risk.") (citing *Preston v. Sleziak*, 383 Mich.175 N.W.2d 759) (emphasis added), *and* *Pippin v. Atallah*, 626 N.W.2d 911, 915 (Mich. Ct. App. 2001) (holding that a landowner must refrain from injuring a trespasser willfully or wantonly).

<sup>23</sup> *James*, 626 N.W.2d at 162.

<sup>24</sup> *Doran*, 354 N.W.2d at 805. Presumably, the phrase "merely tolerates" does not refer to the landowner's enthusiasm for the licensee's company, but instead conveys the idea that the licensee is not on the owner's land to bestow any benefit on the owner. *See id.* In *Doran*, the plaintiff, Bertha Doran, was bringing defendant's children home from a weekend visit with their father. *Id.* As Ms. Doran was defendant's former mother-in-law, however, "tolerates" may be an accurate assessment of defendant's feelings about the plaintiff's presence on her land. *See id.*

<sup>25</sup> *James*, 626 N.W.2d at 162; *White v. Badalamenti*, 505 N.W.2d 8, 9 (Mich. Ct. App. 1993). The "tangible benefit" can be informal and can go both ways. For example, in *White*, the Michigan Court of Appeals held that a babysitter may be an invitee rather than a social guest. 505 N.W.2d at 9. The court reasoned that just because the plaintiff babysitter did not pay the defendants to baby-sit their daughter did not mean they did not derive a tangible benefit from the babysitter's visit. *Id.* *See also* *Altairi v. Alhaj*, 599 N.W.2d 537, 538 (Mich. Ct. App. 1999) (holding that an acquaintance of defendant who was invited over for coffee was a licensee).

<sup>26</sup> *James*, 626 N.W.2d at 162.

<sup>27</sup> *White*, 505 N.W.2d at 9. For a further discussion of the open and obvious danger doctrine see discussion *infra* Part II.B.

not owe any affirmative duty to licensees to inspect and maintain the premises in a condition that is reasonably safe for their licensees' use.<sup>28</sup> This differs from the duty owed to invitees, which is higher than the duty owed to both trespassers and licensees.

Generally speaking, landowners owe their business invitees the highest standard of care. Land possessors have a duty to invitees to exercise ordinary care and prudence to keep the premises reasonably safe.<sup>29</sup> Land possessors owe invitees a duty to exercise ordinary care to keep their premises in a reasonably safe condition for invitees' use; this level of care includes a duty to maintain, warn, and inspect.<sup>30</sup> In addition to a duty to repair and warn, land possessors must also inspect the premises to discover dangerous conditions.<sup>31</sup> An invitee is an individual who is on the possessor's land for a reason that bestows a commercial or pecuniary benefit on the possessor.<sup>32</sup> This pecuniary interest is "a sort of quid pro quo for the higher duty of care owed to invitees."<sup>33</sup> A classic example is an individual who visits a store owned by a possessor and makes a purchase.<sup>34</sup> In such a case, the pecuniary benefit is concrete and direct; the possessor holds the premises open to the public for the purposes of doing business and the individual patronizes that establishment.<sup>35</sup>

However, what benefits are sufficient to bestow invitee status on a visitor is not entirely clear in other cases.<sup>36</sup> On one hand, some cases seem to suggest that a commercial business

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<sup>28</sup> *James*, 66 N.W.2d at 162.

<sup>29</sup> *Kroll v. Katz*, 132 N.W.2d 27, 32 (Mich. 1990).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 30-32; *Douglas v. Elba, Inc.*, N.W.2d 117, 119 (Mich. Ct. App. 1992).

<sup>32</sup> *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 95 (2000).

<sup>33</sup> *Id.*

<sup>34</sup> *See, e.g., Price v. Kroger Co. of Michigan*, 773 N.W.2d 739, 740 (Mich. App. 2009).

<sup>35</sup> *Id.*

<sup>36</sup> *Stitt*, 614 N.W.2d at 92.

purpose is necessary to confer invitee status on a visitor.<sup>37</sup> On the other hand, there are several early Michigan decisions that suggest a more liberal interpretation of “bestowing a benefit” on the landowner.<sup>38</sup> The plaintiff in *Stitt* sought to exploit that ambiguity by claiming that attendance at a Bible study class at defendant church conferred invitee status on her according to Michigan cases that allegedly recognized invitee liability for churches.<sup>39</sup> The Michigan Supreme Court declined to adopt this interpretation of Michigan law, reasoning that invitee status had only been conferred on church visitors who were on the church premises for commercial purposes.<sup>40</sup> Once it has been established that a visitor is an invitee, land possessors must maintain the premises in a reasonably safe condition; warn invitees of dangers they know of, should know of, or have created—unless those dangers are open and obvious; and inspect the premises to discover possible dangerous conditions if a reasonable person would have inspected under the circumstances.<sup>41</sup> While the common law duties owed to trespassers, licensees, and invitees have been outlined, Michigan case law also provides for the specific duties owed to tenants by landlords.

#### B. Rent-A-Status: Duties Owed by Landlords to Tenants.

Having established the duty owed to each of the three classic categories of land occupiers under Michigan case law, it is time to examine the somewhat differing duties owed to tenants. At common law, the duty owed by a landlord to his tenant was based on the facts and

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<sup>37</sup> *Id.* at 92-93 (citing *Perl v. Cohodas, Peterson, Paoli, Nast Co.*, 294 N.W. 697 (Mich. 1940); *Diefenbach v. Great Atlantic & Pacific Tea Co.* 273 N.W. 783 (Mich. 1937); *Sink v. Grand Trunk Western R. Co.*, 198 N.W. 238 (Mich. 1924).

<sup>38</sup> *Id.* at 93 (citing *Polston v. S.S. Kresge Co.*, 37 N.W.2d 638 (Mich. 1949); *Sheldon v. Flint & P.M. R. Co.*, 26 N.W. 507 (Mich. 1886); *Hargreaves v. Deacon*, 25 Mich. 1 (1872).

<sup>39</sup> *Id.* at 94.

<sup>40</sup> *Id.*

<sup>41</sup> *Kroll v. Katz*, 132 N.W.2d 27, 30-32 (Mich. 1965); *Douglas v. Elba, Inc.*, N.W.2d 117, 119 (Mich. Ct. App. 1992).



circumstances of each case.<sup>42</sup> When making the determination of what duty was owed, the most important factor to consider was that of control.<sup>43</sup> “The common law duty is predicated upon the concept that a lease is equivalent to a sale,” thus, only areas in which the lessor retained an interest could subject the lessor to liability for injuries sustained by lessees.<sup>44</sup> A landlord has no obligation to repair and maintain premises that are not under his control; however, landlords have an obligation to keep any portion of the premises under their control in a safe condition.<sup>45</sup> All those common areas of the building not leased to tenants are the responsibility of the landlord.<sup>46</sup> A landlord must keep the common areas of the building such as the “halls, lobby stair, elevators, etc. . . . in good repair and reasonably safe for the use of his tenants and invitees.”<sup>47</sup> *Quinlivan v. Great Atlantic & Pacific Tea Co., Inc.*, states that “where a landlord or a tenant has, by virtue of a lease, assumed that degree of obligation with respect to the demised property as to indicate that control rests in him he will be held to answer for any breach of the duty to maintain the premises in a reasonably safe condition.”<sup>48</sup> The Michigan Supreme Court, in *Allison v. AEW Capital Management, LLP d/b/a Sutton Place Apartments*, defined common areas as those areas which are shared by “two or more, or all, of the tenants and over which the lessor retains general control.”<sup>49</sup>

Michigan case law has further refined the duty owed to tenants by landlords. Since landlords retain exclusive control of common areas such as parking lots, the landlord has granted

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<sup>42</sup> *Lipsitz v. Schechter*, 142 N.W.2d 1, 2 (Mich. 1966).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2-3. This duty also extends to tenant’s invitees. *Id.* at 3. See also 339 N.W.2d 215, 217 (Mich. Ct. App. 1983). The Michigan Supreme Court has, under some circumstances, broadened this duty to include a duty to protect tenants and their invitees from criminal activities. *Id.*

<sup>46</sup> *Shackett v. Schwartz*, 258 N.W.2d 543, 545 (Mich. Ct. App. 1977).

<sup>47</sup> *Id.*

<sup>48</sup> 235 N.W.2d 732, 743 (Mich. 1975) (citing *Blumer v. Saginaw Cent. Oil & Gas Serv., Inc.*, 97 N.W.2d 90 (Mich. 1959); *Siegel v. Detroit City Ice & Fuel Co.*, 36 N.W.2d 719 (Mich. 1949)).

<sup>49</sup> *Allison v. AEW Capital Management, LLP d/b/a Sutton Place Apartments*, 751 N.W. 2d 8, 13 (Mich. 2008).

the tenant a license to use such common areas.<sup>50</sup> The Michigan Court of Appeals reasoned that since tenants pay for this license as part of their rent, “tenants are invitees of their landlords while in the common areas because the landlord has received a pecuniary benefit for licensing for their presence.”<sup>51</sup> The court in *Stanley* extended this duty to cooperatives because cooperative associations retain exclusive control over common areas just as landlords do, and as such, they receive the same pecuniary benefit from the cooperative owners use of the common are and are the only ones who can act to keep the common areas reasonably safe.<sup>52</sup> Tenants are regarded as the invitees of their landlord and, as such, landlords owe tenants a duty to maintain the premises in a reasonably safe condition; however, there is still no duty to protect or warn where the danger complained of is open and obvious.<sup>53</sup> A tenant’s invitees and social guests are also treated as the landlord’s invitees while they are in the common areas of the premises.<sup>54</sup> One exception to this imposition of liability is that in the absence of a contract to the contrary, a landlord has no duty to remove natural accumulations of snow and ice from common area walkways unless such an accumulation has arisen due to the landlord’s maintenance of the common area.<sup>55</sup> However, this immunity from liability is not absolute and can be overridden by statute.<sup>56</sup>

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<sup>50</sup> *Stanley v. Town Square Cooperative*, 512 N.W.2d 51, 53-54 (Mich. Ct. App. 1993).

<sup>51</sup> *Id.* at 54.

<sup>52</sup> *Id.* at 53.

<sup>53</sup> *Woodbury v. Bruckner*, 650 N.W.2d 343, 348 (Mich. Ct. App. 2002) (citing *Stanley*, 512 N.W.2d at 51).

<sup>54</sup> *Petraszwesky v. Keeth*, 506 N.W.2d 890, 891 (Mich. Ct. App. 1993).

<sup>55</sup> *Gossman v. Lambrecht*, 221 N.W.2d 424, 426 (Mich. Ct. App. 1974).

<sup>56</sup> *See discussion infra* Part II.A.

## II. MITTEN-SPECIFIC: MICHIGAN LAW REGARDING PREMISES LIABILITY AND LANDLORD DUTIES

For the purposes of this Comment, the relevant law regarding liability of private landowners for conditions on the land comes primarily from two sources: statute and case law.<sup>57</sup> The relevant statute is M.C.L. § 554.139(1),<sup>58</sup> which mandates an implied covenant between lessor and lessees of residential properties.<sup>59</sup> As to common law, the Michigan Premises Liability law establishes what elements must be proved in order to recover for damages when injured on the land of another.<sup>60</sup> Michigan’s premises liability law includes an important doctrine that can negate the duty of a land possessor, and, by extension, liability.<sup>61</sup> Upon considering both sources of law, the advantage of applying M.C.L. § 554.139(1)’s protection to condominium owners becomes apparent.

### A. Un-Common Law: A Landlord’s Duty Under M.C.L. § 554.139

Michigan law imposes an additional burden on possessors of land who lease or license the land for residential purposes. Under the Michigan Compiled Laws, “[i] every lease or license of residential premises, the lessor or licensor covenants. . . . [t]hat the premises and all common areas are fit for the use intended by the parties.”<sup>62</sup> A “common area” is “the portion of demised premises used in common by tenants over which landlord retains control (e.g. hallways, stairs) and hence for whose condition he is liable. . . .”<sup>63</sup> M.C.L. § 554.139 (1) (a) imposes a statutory duty upon a lessor or licensor of residential premises to make sure “that the premises and all common areas are fit for the use intended by the parties.” Subsection (b) likewise states that a

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<sup>57</sup> The liability of government entities for injuries occurring on government property is governed by its own statutory scheme, which is outside the scope of this Comment.

<sup>58</sup> M.C.L. 554.139(1).

<sup>59</sup> *Id.*

<sup>60</sup> See discussion *infra* Part II.B.

<sup>61</sup> See discussion *infra* Part II.B.

<sup>62</sup> M.C.L. § 554.139(1).

<sup>63</sup> See *Allison v. AEW Capital Management, LLP d/b/a Sutton Place Apartments*, 751 N.W. 2d 8, 13 (Mich. 2008).

lessor or licensor has a duty “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 or government where the premises are located . . .” Section (3) further provides that the statute is to be “*liberally construed.*”<sup>64</sup> As such, a landlord/licensor has a duty to ensure that sidewalks and other such “common areas” are fit for their intended use.

This statutory duty is mostly important when applied to the successful prosecution of claims against landlords—or, in the hypothetical case, a condominium association. When a claim is premised on premises liability or ordinary negligence, common law defenses may be asserted. However, a common law defense cannot be used to bar a claim against a landlord when the landlord owed a statutory duty to maintain the premises.<sup>65</sup> In such a case, if a defendant landlord breached its duty under M.C.L. § 554.139(1), the defendant would be liable to plaintiff regardless of an available common law defense, such as notice.<sup>66</sup> Since M.C.L. § 554.139(1) “provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by common law,” a landlord cannot avoid this statutorily mandated duty by way of the open and obvious danger defense, or any other common law defense.<sup>67</sup> Another such example of the expansion of the duty owed beyond common law is that a natural accumulations of snow and ice are within the lessor’s duty to maintain the common areas “fit for the use intended by the parties,” under M.C.L. § 554.139(1)(a).<sup>68</sup> Because these duties are a statutory part of any residential lease, a breach of the duty to maintain the premises according to M.C.L. §

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<sup>64</sup> M.C.L. § 554.139.

<sup>65</sup> *Benton v Dart Properties, Inc*, 715 N.W.2d 335 (Mich. Ct. App. 2006).

<sup>66</sup> *Id.* (citing *O’Donnell v Garasic*, 676 N.W.2d 213 (Mich. Ct. App. 2004)).

<sup>67</sup> *Allison*, 751 N.W.2d at 12.

<sup>68</sup> *Id.* at 14.

554.139 (1)(a) or (b) would be construed as a breach of the lease and contract remedies would be available to the injured licensee or lessee.<sup>69</sup>

## B. The State of Things: Michigan Premises Liability

In order to understand the advantages of holding condominium associations to the standards outlined in M.C.L. § 554.139(1), it is vital to understand the state of Michigan premises liability law. Under Michigan law, in order to successfully bring a claim for premises liability, the plaintiff must prove the elements of ordinary negligence: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) an injury proximately caused by the breach of that duty; and (4) damages.<sup>70</sup> The question of duty is one for the court to decide as a matter of law.<sup>71</sup> However, a landowner is not liable for injuries sustained because of any open or obvious dangers which a reasonable observer could have discovered with due care.<sup>72</sup> This states the so-called “open and obvious doctrine.”<sup>73</sup> This doctrine appeared in Michigan case law in the mid-twentieth century.<sup>74</sup> A finding that a danger was open and obvious generally negates a duty to warn on the part of the landowner.<sup>75</sup> It is important to understand that “the open and obvious doctrine is not a per se exception to duty, but is an ‘integral part of the definition of that duty.’”<sup>76</sup>

However, the open and obvious defense is not absolute.

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<sup>69</sup> *Id.* at 12.

<sup>70</sup> *Moning v. Alfonso*, 254 N.W.2d 759, 764 (Mich. 1977).

<sup>71</sup> *Id.*

<sup>72</sup> *Kroll v. Katz*, 132 N.W.2d 27, 32 (Mich. 1965).

<sup>73</sup> Audra Annette Arndt, *The Evolution of Michigan’s Open and Obvious Doctrine in Premises Liability and Recreational Activities Cases and the Lessening of Liability for Defendants*, 81 U. DET. MERCY L. REV. 191, 192 (2004). For a scathing and humorous commentary on the open and obvious doctrine in Michigan law, see John A. Braden, *Adventures in OpenandObvious Land*, 86 MICH. B. J. 28 (2007). Braden’s take on the rulings of Michigan courts is illustrated by his assertions about Michigan’s “reasonably prudent person.” “[o]ur vision, too is phenomenal. We can see in the dark. We can see ice or other dangers under snow. . . . We can see around corners. We can see through other objects. We can see simultaneously in multiple directions. We have eyes in the back of our heads.” *Id.* at 29 (internal citations omitted).

<sup>74</sup> Arndt, *supra* note 73. Arndt cites *Fisher v. Johnson Milk Inc*, 174 N.W.2d 752 (Mich. 1970) as the appearance of the open and obvious doctrine in Michigan case law. *Id.*

<sup>75</sup> *Id.* at 197.

<sup>76</sup> *Id.*

A condition may not be open and obvious based on “special aspects” of the danger.<sup>77</sup> These “special aspects” are based on the characteristics of the danger, not the individual plaintiff.<sup>78</sup> *Lugo* contemplates situations in which these “special aspects” of the danger impose liability on the landowner despite the obviousness of the danger because the danger is, legally speaking, unreasonably dangerous.<sup>79</sup> The *Lugo* opinion offers a couple of illustrations of such dangers. First, there is the “effectively unavoidable” exception. The example of an effectively unavoidable danger is an accumulation of standing water in front of the only public entrance to a commercial building.<sup>80</sup> Another “special aspect” of a condition that may render it “unreasonably dangerous” and thus remove it from the open and obvious doctrine is a condition that poses an “unreasonably high risk of severe harm.”<sup>81</sup> The illustration given of a condition that poses such an unreasonably high risk of harm is an unguarded thirty foot pit in the middle of a parking lot.<sup>82</sup>

Aside from these two examples, application of the open and obvious doctrine to conditions on the land is a source of much confusion and frustration for Michigan practitioners.<sup>83</sup> The Michigan Court of Appeals held in *Sidorowicz* that an accumulation of water on the floor of a men’s restroom was open and obvious in spite of the plaintiff’s blindness, because an

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<sup>77</sup> *Lugo v. Ameritech Corp.*, 692 N.W.2d 384, 386-87 (Mich. 2001). Plaintiff was walking through defendant’s parking lot to pay a telephone bill when she stepped into a pothole, injuring herself. *Id.* at 385. Plaintiff did not see the pothole because she was looking out for traffic in the parking lot, not because the pothole itself was obscured. *Id.* The Michigan Supreme Court held that the common potholes in parking lots are not open and obvious because they are readily apparent to the casual observer and do not involve an especially high risk of injury. *Id.* at 388. The court reinstated the circuit court’s grant of summary disposition to the defendant reasoning that the plaintiff did not see the pothole because she was not looking down, not because the pothole was somehow obscured from her view. *Id.* at 388-89, 391.

<sup>78</sup> See *Slaughter v. Blarney Castle Oil Co.*, 760 N.W.2d 287, 289 (Mich App. 2008); *Sidorowicz v. Chicken Shack, Inc.*, No. 239627, 2003 WL 140127, at \*2-\*3 (Mich. App. Jan. 17, 2003); *Lauff v. Wal-Mart Stores, Inc.*, No. 1:01-CV-777, 2002 WL 32129976, at \*4-\*5 (W.D. Mich. Oct. 2, 2002).

<sup>79</sup> *Lugo*, 629 N.W.2d at 387; Evan Leibhan, *The Invisible Obvious: The Michigan Judiciary’s Distortion of the Open and Obvious Doctrine*, 52 WAYNE L. REV. 1483, 1485-86 (2006).

<sup>80</sup> *Lugo*, 629 N.W.2d at 387. This “effectively unavoidable” rationale has been applied to cases that center around dangers posed by snow and ice. Leibhan, *supra* note 80 at 1498.

<sup>81</sup> *Lugo*, 629 N.W.2d at 387.

<sup>82</sup> *Id.*

<sup>83</sup> Leibhan, *supra* note 79, at 1483.

ordinarily prudent person would have discovered the water upon casual inspection and thus, no special aspects of *the hazardous condition itself* removed the case from the open and obvious doctrine.<sup>84</sup> The decisions in *Lugo*, *Lauff*, and *Sidorowicz* have redefined the reasonably cautious observer. The *Lugo* opinion asserts that the subjective care asserted by the plaintiff is unimportant to the analysis of whether a danger was open and obvious; rather, the inquiry is focused “on the objective nature of the condition of the premises at issue.”<sup>85</sup> The *Lauff* and *Sidorowicz* decisions in particular appear to define the reasonably prudent person as a “reasonably prudent *sighted* person.”<sup>86</sup>

The application of the doctrine to snow and ice is another source of tension. In *Kenny v. Kaatz Funeral Home, Inc.*, the Michigan Supreme Court adopted the dissenting position of a Court of Appeals judge in holding that black ice was open and obvious in the case of a woman who fractured her hip after falling on snow-covered black ice.<sup>87</sup> The Michigan Supreme Court’s decision merely stated that it adopted Judge Griffith’s dissent, which advanced the position that the ice was obvious to plaintiff because she observed her friends gripping the car to keep their

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<sup>84</sup> 2003 WL 140127 at \*3. *See also Lauff*, 2002 WL 32129976 at \* 4-\*5 (rejecting an argument that an accumulation of toilet paper, water, and “gook” on the bathroom floor was not open and obvious to Plaintiff because she was blind; rather, that the danger was open and obvious because a it would have been visible to an ordinarily prudent person).

<sup>85</sup> 629 N.W.2d 384, 390 (Mich. 2001). *See* Richard H. Bernstein, *The Vanishing Rights of the Blind*, 83 MICH. B.J. 32, 33 (2004) (arguing that the *Lugo* decision and its progeny strip blind individuals of their rights to be kept safe from dangerous conditions on the land of others).

<sup>86</sup> Bernstein, *supra* note 85. This view, of course, has spawned some discontent. Michigan attorney Richard H. Bernstein (who is blind) denounces the stance taken by Michigan courts in the *Lugo*, *Lauff*, and *Sidorowicz* decisions, observing, “[i]n other words, if you are blind or have other physical limitations, you leave your house at your own risk. If a store, restaurant, or office building fails to promptly remove a dangerous condition, it is your fault if you get hurt when you encounter it.” *Id.* Mr. Bernstein also points out the tension inherent between this interpretation of the law and the Michigan Persons With Disabilities Civil Rights Act, which protects the rights of the disabled to participate in society, using the following hypothetical as an illustration:

Among other things, this statute requires a building owner to mark its elevator buttons with Braille, so that I can locate the right floor. At the same time, *Lugo* protects the building owner, if its elevator car stalls on another floor and I step through an open door into an empty elevator shaft.

*Id.*

<sup>87</sup> *Kenny v. Kaatz Funeral Home Inc.*, 697 N.W.2d 526, 526 (Mich. 2005); *Kenny v. Kaatz Funeral Home, Inc.*, 689 N.W.2d 737, 746 (Mich. Ct. App. 2004) (Griffin, J., dissenting); Liebhan, *supra* note 79, at 1487-88.

footing, and lifelong Michigan residents should know that icy conditions often form under snow.<sup>88</sup> However, there is evidence that the tide may be turning the other way. In *Slaughter*, the Michigan Court of Appeals held that black ice is not open and obvious because it is, by definition, invisible, and thus, a reasonable person of obvious intelligence would not be able to discover the danger upon casual inspection.<sup>89</sup> As it now stands, however, the effect of Michigan's open and obvious doctrine is to diminish the value of premises liability claims and settlements.<sup>90</sup> Plaintiffs, concerned about dismissal at the summary disposition stage, may settle for less than a fair value, hoping to get even a small settlement for medical bills.<sup>91</sup> Defendants may file for summary disposition very early, point-blank refusing to pay even a nuisance value for cases in which they are so well protected by the common law defense.<sup>92</sup> With this high bar for premises liability claims, a statutory alternative for recovery is attractive to plaintiffs and would offer greater protection to certain categories of land occupiers.

### III. OUTSIDE THE MITTEN: THE LAW IN OTHER JURISDICTIONS

While Michigan courts have not ruled on the issue of whether statutory duties of landlords apply to condominium associations, other states have examined the duties condominium associations owe to condominium owners.<sup>93</sup> A number of states have statutes that prescribe responsibilities of landlords with respect to certain areas of their premises.<sup>94</sup> Other states have examined, through case law, the duties owed to condominium owners by condominium association.<sup>95</sup> Of those states that have examined such duties, some have ruled

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<sup>88</sup> *Kaatz*, 697 N.W.2d at 526; *Kenny*, 689 N.W.2d at 747-48; *Liebhan*, *supra* note 79, at 1490-91.

<sup>89</sup> 706 N.W.2d at 292.

<sup>90</sup> *Arndt*, *supra* 73, at 214.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See discussion *infra* Parts III.A., III.B.

<sup>94</sup> See discussion *infra* Part III.A.

<sup>95</sup> See discussion *infra* Part III.B.



that condominium associations have the same responsibilities as a landlord with respect to condominium owners in the common areas of the condominium development.<sup>96</sup> Understanding the rationale other state courts have used in applying duties of landlords to condominium associations is vital to understanding why similar duties should be imposed on Michigan condominium associations.

#### A. By the Book: Statutory Law in Other States

Several states have statutes addressing the duties lessors or landlords owe to lessees or tenants. For the most part, the duties imposed are similar to those imposed under the Michigan statute. According to the relevant Florida statute, “[t]he landlord of a dwelling unit other than a single-family home or duplex shall, at all time during the tenancy, make reasonable provisions for . . . the clean and safe condition of common areas.”<sup>97</sup> The South Dakota statute mirrors the Michigan statute even more:

In every hiring of residential premises, whether in writing or parol, the lessor shall keep the premises and all common areas in reasonable repair and fit for human habitation and in good and safe working order during the term of the lease except when the disrepair has been caused by the negligent, willful or malicious conduct of the lessee or a person under direction or control.<sup>98</sup>

The South Dakota statute makes specific mention of the fact that the parties to the lease may not waive or modify the statute’s requirements.<sup>99</sup>

New York’s statute is similar to South Dakota’s, and, by extension, Michigan’s. The New York statute provides as follows:

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<sup>96</sup> See discussion *infra* Part III.B.

<sup>97</sup> FLA. STAT. § 83.51(2)(a)(4)(2010).

<sup>98</sup> S.D. CODIFIED LAWS § 43-32 (2010).

<sup>99</sup> *Id.*

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.<sup>100</sup>

The New York statute similarly prohibits parties modifying or waiving their statutory rights.<sup>101</sup>

New York's language referring to the requirement that landlords keep the common areas fit for use "reasonably intended by the parties"<sup>102</sup> mirrors the requirement in the Michigan statute that the landlord keep the common areas "fit for the use intended by the parties."<sup>103</sup> West Virginia also provides for the proper maintenance of common areas, stating that, "[a] landlord shall . . . [i]n multiple housing units, keep clean, safe and in repair all common areas of the premises remaining under his control that are maintained for the use and benefit of his tenants."<sup>104</sup>

The Georgia statute does not explicitly mention the landlord/tenant relationship; rather, it provides: "[w]here an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe."<sup>105</sup> However, Georgia courts have applied the code section to condominium associations to impose the statutory duties to treat condominium unit owners as invitees as to the common areas of the property.<sup>106</sup> Statutes are not the only source of condominium association

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<sup>100</sup> N.Y. REAL PROPERTY LAW § 235-b(1) (McKinney 2010).

<sup>101</sup> N.Y. REAL PROPERTY LAW § 235-b(2).

<sup>102</sup> N.Y. REAL PROPERTY LAW § 235-b(1).

<sup>103</sup> M.C.L. § 554.139(1)(a).

<sup>104</sup> W, Va Code § 37-6-30(a)(3) (2010).

<sup>105</sup> G.A. Code Ann. § 51-31

<sup>106</sup> Bradford Square Condo. Ass'n., Inc., v. Miller, 573 S.E.2d 405, 409 (Ga. Ct. App. 2002) (citing Sacker v. Perry Realty Servs., Inc., 457 S.E.2d 208 (Ga. Ct. App. 1995)).

and landlords duties in other jurisdictions; other state courts have imposed similar duties on both landlords and condominium associations.

#### B. More Common than You'd Think: Common Law in Other States

The case law in other states focuses on the elements of control and the similarities between lessees and condominium owners to impose more stringent duties on condominium associations. As a preliminary matter, the condominium association is liable in tort to its members and unit owners may sue for damages.<sup>107</sup> For example, in *Martinez v. Woodmar IV Condominium Homeowners Ass'n, Inc.*,<sup>108</sup> the Arizona Supreme Court held that a condominium association, much like landlord, has duty to maintain common areas under its control and to keep them in safe condition for protection of unit owners and their guests.<sup>109</sup> The court focused its inquiry on the defendant condominium association's relationship to the land and whether the defendant occupied a similar status to a landlord.<sup>110</sup> The court compared a condominium unit owner to a lessee: "Defendant . . . is not a lessor but a new type of possessor—a condominium association that has retained in its control common areas, such as the parking lot, that unit owners are entitled to use as appurtenant to their unit."<sup>111</sup> The Arizona Supreme Court, in holding that the condominium association owed a duty of reasonable care to plaintiff, relied on the level of control exercised over the common areas by the condominium association.<sup>112</sup> The court, in its analysis, had the following to say on the subject of control and the resulting duties condominium associations owe:

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<sup>107</sup> See, e.g., *White v. Cox*, 17 Cal. App. 3d 824, 830 (1971).

<sup>108</sup> 941 P.2d 218, 220 (Ariz. 1997). Plaintiff was a guest of a condominium owner at Defendant's condominium complex. *Id.* at 219. Plaintiff was injured in the condominium association's parking lot and brought suit for personal injury. *Id.*

<sup>109</sup> *Id.* at 220.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 221.

<sup>112</sup> *Id.* at 220-21.

The element of control, we believe, is essential to a finding of duty for the condominium association. Like a landlord who maintains control and liability for conditions in common areas, the condominium association controls all aspects of maintenance and security for the common areas and, most likely, forbids individual unit owners from taking on these chores. Thus, if the association owes no duty of care over the common areas of the property, no one does because no one else possesses the ability to cure defects in the common area. We do not believe the law recognizes such a lack of responsibility for safety. We therefore hold that with respect to common areas under its exclusive control, a condominium association has the same duties as a landlord.<sup>113</sup>

Similarly, in *Sacker v. Perry Realty Services, Inc.*,<sup>114</sup> a Georgia appellate court held that a condominium owner was an invitee while in the common areas because of clear mutuality of obligations and interests between owner and association.<sup>115</sup> In *Bradford*, the Georgia Court of Appeals relied on this holding when it applied the relevant Georgia statute to a condominium association.<sup>116</sup> While the Georgia code section was not specifically cited, the court in *Bradford* reasoned, the court applied the section by holding that a condominium unit owner was an invitee of the condominium association while in the common areas of the complex, and so, the condominium association owed unit owners a duty of ordinary care.<sup>117</sup> “In so holding, we implicitly recognized that, through the Act and the condominium instruments, it was the specific responsibility of the condominium association to physically maintain the parking lot/common element of the property, and so the association’s duty of care extended to such express responsibility.”<sup>118</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> 457 S.E.2d 208, 210 (Ga. Ct. App. 1995).

<sup>115</sup> *Id.*

<sup>116</sup> *Bradford Square Condo. Ass’n, Inc.*, 573 S.E.2d 405, 408 (Ga. Ct. App. 2002) (citing *Sacker*, 457 S.E.2d 208, 210). The *Bradford* court further held that a condominium’s by-laws may limit the condominium association’s liability, but that is a matter of contract law and outside the scope of this Comment. *Id.* at 410.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 408.

The Connecticut Court of Appeals has also examined the issue of a condominium association's duties to condominium unit owners.<sup>119</sup> The *Dibble Hollow* court held that the relationship between a condominium association and unit owner is the same as the traditional common-law duties that a land possessor owes to an invitee.<sup>120</sup> In analyzing the relationship between condominium association owners, the court analogized as follows: "much like a tenant in a driveway specifically allocated for his use, but controlled and maintained by the landlord or other land possessor, the plaintiff certainly had more than mere permission to be in his driveway."<sup>121</sup> The *Dibble Hollow* court thus reasoned that the condominium association owed the condominium unit owners the duty of care owed to invitees.<sup>122</sup> Because the condominium association was responsible for the maintenance of the driveways and individual owners had no obligation to maintain the driveways, the court found that the relationship between condominium unit owners and the association was "consistent with the traditional landlord-tenant relationship."<sup>123</sup> Extrapolating from existing statutes and common law, the reasonableness of applying statutory landlord duties to condominium associations becomes clear.

#### IV. CONDOMINIUM ASSOCIATIONS SHOULD BE HELD TO THE SAME STANDARDS AS LANDLORDS UNDER M.C.L. § 554.139.

There are numerous reasons for holding condominium associations to the standards of landlords under M.C.L. § 554.139(1). First, the condominium association reaps the pecuniary benefits of the unit owner's presence on the common area.<sup>124</sup> Furthermore, the condominium association retains exclusive control over such common areas, so it is in the best position—in

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<sup>119</sup> *Sevigny v. Dibble Hollow Condo. Ass'n, Inc.*, 819 A.2d 844, 848 (Conn. Ct. App. 2003). Plaintiff slipped and fell on ice in the driveway of his condominium association, injuring his back. *Id.* Plaintiff brought a negligence suit against the condominium complex, the management company and the snow removal company. *Id.* at 848-49.

<sup>120</sup> *Id.* at 854.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See* discussion *infra* Part IV.A.

fact, the only one in a position—to maintain the common areas in a reasonably safe condition.<sup>125</sup> Imposing the statutory duties of landlords under the relevant statute on condominium associations would advance the important public policy of holding persons and entities responsible for the safety of others. Furthermore, Michigan common law already treats unit owners and tenants similarly in terms of the duties owed to them on the common areas of the complex. Thus, it is a small step to hold them to a similar standard under the statute.<sup>126</sup> It would be a natural extension of the existing law in Michigan to treat condominium associations as landlords under M.C.L. § 554.139(1).

A. Assume the Best Position: Condominium Associations Are in the Best Position to Maintain the Common Areas

Both tenants and condominium owners pay a fee for the use of the common areas of the development. Tenants pay rent and this gives them a license to use the common areas, and courts have held that this means landlords have a duty to properly maintain such common areas. Similarly, condominium owners pay association fees that are used to fund the maintenance of the common areas of the development, such as snow removal and landscaping. In both cases, it is the landlord or association that has responsibility and control over how such maintenance will be carried out and by whom. Both landlords and condominium associations have the exclusive power to decide which subcontractors—if any—will be hired to maintain the common areas—for example, landscapers, lawn services, and snow removal companies. Thus, the landlord or condominium association is in the best position to assume responsibility for those common areas.

A condominium owner has no more control over how the common areas are maintained than the apartment tenant; and so, it makes little sense to afford them less recourse against a

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<sup>125</sup> See discussion *infra* Part IV.A.

<sup>126</sup> See discussion *infra* Part IV.B.

condominium association than a tenant has against the landlord who fails to properly maintain those common areas. Since the condominium association, like a landlord, is in the best position to oversee the maintenance of the common areas, it only makes sense to hold them to the same standard under the statute as a landlord would be held to.

Individuals who live in developments with common elements are invitees while using those common elements because the land possessor reaps a pecuniary gain from the resident's use of that area. This pecuniary interest—be it in the form of rent or maintenance fees—is “a sort of quid pro quo for the higher duty of care owed to invitees.”<sup>127</sup> In *Stitt*, the Michigan Supreme Court held that the extra duties of inspection and maintenance must be tied to the land owner's commercial business interests when a church visitor was injured after a fall in the parking lot.<sup>128</sup> The Michigan Court of Appeals held that such commercial interests are implicated when a residential development has the sole possession of the common areas of the property and residents pay money that goes towards use of those common areas when the guest of an apartment *owner* in a cooperative association was attacked in the common area parking lot.<sup>129</sup>

Apartment tenants and condominium owners bestow pecuniary benefits to the landlord and condominium association respectively, because they pay either rent or maintenance fees in exchange for the use of the common areas. At least with respect to the common areas of the development, both tenants and condominium owners should be treated as invitees.

Just as a landlord has exclusive control over common areas of an apartment complex, the cooperative association has exclusive control over such common areas and is therefore “the only

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<sup>127</sup> *Stitt v. Holland Abundant Life Fellowship*, 462 Mich 591, 604, 614 NW2d 88 (2000); *Stanley v. Town Square Cooperative*, 203 Mich App 143, 147-48, 512 NW2d 51 (1994).

<sup>128</sup> 462 Mich at 604-05.

<sup>129</sup> *Stanley*, 203 Mich App at 147-48.

one that can act to make the common areas safe.”<sup>130</sup> Analogously, a condominium association has exclusive control over the common areas of an apartment complex and the only real difference between an apartment cooperative in which the residents own their unit and a condominium development is the type of unit owned by the residents—an apartment in the case of a cooperative and a house in the case of a condominium development. Hence, makes little sense to treat a co-op owner and a condominium owner differently in the eyes of the law. As the law in Michigan already treats co-op owners as invitees in the common areas of the complex, the law should likewise treat condominium owners as invitees on the common areas, and impose the higher standard of care. Once the condominium association is required to meet this higher standard of care, it is only logical to impose similar statutory duties, which essentially codify the common-law duty of care owed to invitees.

#### B. Unit Owners and Tenants Are Already Treated Similarly in Other Contexts

##### V. IF IT CAN WORK THERE, IT CAN WORK HERE: APPLYING SIMILAR DUTIES TO CONDOMINIUM ASSOCIATIONS HAS WORKED IN OTHER JURISDICTIONS

Applying statutory landlord duties to condominium associations has worked in other states and there is no reason to believe that it would cause a flood of lawsuits in Michigan or would upset the current docket-load of the court system. Although Michigan’s appellate courts have yet to address the issue, several jurisdictions have equated the duty owed by a condominium association to its residents with the duty owed by a landlord to its tenant.<sup>131</sup> An individual unit owner who is a member of the association may also maintain a negligence action

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<sup>130</sup> *Id.* at 146.

<sup>131</sup> *See*, 15A Am. Jur. 2d 823, *Condominiums and Cooperative Apartments* § 58 (2000) (a “condominium association may . . . be held to [a] landlord’s standard of care as to common areas under its control”); *Martinez v. Woodmar IV Condo. Homeowners Assn, Inc.*, 189 Ariz. 206, 208–209, 941 P2d 218 (1997); *Sacker v. Perry Realty Servs, Inc.*, 217 Ga. App. 300, 457 SE2d 208 (1995).



against the association for negligent maintenance of its common areas.<sup>132</sup> For example, in *White v. Cox*,<sup>133</sup> the California Court of Appeals held that a member-unit owner can maintain negligence action against association for injury sustained on common area.<sup>134</sup> This negates one powerful counterargument to allowing such suits to proceed—that the condominium unit owner would essentially be suing him or herself.<sup>135</sup>

The court in *Cox* used a two-prong test to determine whether a condominium association could be held liable in tort to its members: (1) whether the association has a separate existence from its members and (2) whether the members retain direct control over the association's operations.<sup>136</sup> A condominium association is based upon a fusion of individual ownership and tenancy in common.<sup>137</sup> However, it cannot be argued that condominium unit owners are tenants in common as to the entire project, as separate ownership of each unit is inherent in condominium plan.<sup>138</sup> As to the second point, the condominium in *Cox*, like many others, has an administrator, who oversees the day-to-day operations of the property.<sup>139</sup> That administrator is governed by a board of directors, elected by the unit owners; as most unit owners do not sit on the board of directors, it strains logic to conclude that the average unit owner exercises any control over the operations of the association.<sup>140</sup> This is as true of California condominiums as it is anywhere else. In Michigan, condominium associations are likewise made up of individual unit owners who elect a governing body to oversee the operations of the association. Since the

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<sup>132</sup> 45 ALR3d, 1174–75; 15A Am. Jur. 2d 822, *supra* note 131.

<sup>133</sup> 17 Cal. App. 3d 824, 828 (1971).

<sup>134</sup> Plaintiff, a condominium unit owner tripped over a sprinkler negligently maintained by the defendant condominium association and sustained injuries. *Id.* at 825. The main issue in the case was whether a member of the defendant association could bring a tort action against the condominium association. *Id.* at 826.

<sup>135</sup> *See id.* at 828.

<sup>136</sup> *Id.* at 829

<sup>137</sup> *Id.* at 829-30.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 830.

<sup>140</sup> *Id.*

condominium association is effectively separate from its members, the counterargument against allowing Michigan condominium owners to sue their condominium associations in tort is void. Condominium owners already bring suit against condominium associations and applying these statutory duties to condominium associations would simply provide an alternative theory of liability for member-unit owners.<sup>141</sup>

The Georgia state courts have already recognized that similar statutory duties apply to condominium association owners as well as landlords: “In so holding, we implicitly recognized that, through the Act and the condominium instruments, it was the specific responsibility of the condominium association to physically maintain the parking lot/common element of the property, and so the association’s duty of care extended to such express responsibility.”<sup>142</sup> This decision was handed down in 2002, yet there does not seem a flood of similar litigation in Georgia.<sup>143</sup> Generally speaking, the jurisdictions that impose the higher standard of care on condominium associations rely on the similarities between condominium associations as they relate to the common areas of the project and find that the similar levels of control sufficiently analogize the condominium association to the landlord to justify imposing the additional burden.<sup>144</sup>

One of the most compelling reasons for imposing the higher duties on a condominium association is advanced by the Arizona Supreme Court in the *Martinez* case:

Like a landlord who maintains control and liability for conditions in common areas, the condominium association controls all aspects of maintenance and security for

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<sup>141</sup> See discussion, *supra* Part III.B. As discussed in Part II.B., *supra* this alternative theory of liability would allow Michigan condominium owners to avoid the “open and obvious” doctrine.

<sup>142</sup> *Bradford Square Condo. Ass’n, Inc.*, 573 S.E.2d 405, 408 (Ga. Ct. App. 2002).

<sup>143</sup> The condominium association fees and assessments may act as their own deterrent to bringing such suits. If a condominium owner will be held responsible for an assessment to help pay any judgment levied against the condominium association, it may dampen his or her desire to bring suit.

<sup>144</sup> See *supra* notes 110-123, and accompanying text.

the common areas and, most likely, forbids individual unit owners from taking on these chores. Thus, if the association owes no duty of care over the common areas of the property, no one does because no one else possesses the ability to cure defects in the common area. We do not believe the law recognizes such a lack of responsibility for safety. We therefore hold that with respect to common areas under its exclusive control, a condominium association has the same duties as a landlord.<sup>145</sup>

Applying the statutory duties of a landlord under M.C.L. § 554.139(1) would protect condominium unit owners from the almost insurmountable hurdle posed by the open and obvious doctrine. Furthermore it would hold condominium associations responsible in exchange for the pecuniary benefits they reap from the condominium arrangement. Most importantly, it would advance the important public policy of holding individuals or entities responsible for the safety of others, rather than leaving a vacuum of responsibility.

According to the rationale of other jurisdictions, it is most logical to treat unit-member owners similarly to tenants as it applies to statutory duties covering the common areas because, practically, there is no fundamental difference in the relationship between a tenant or a unit-owner in such situations.<sup>146</sup> Additionally, the condominium association, and not the individual unit owner, retains direct control over the operations of the complex.<sup>147</sup> In both situations, a fee is paid to the possessor for the upkeep and maintenance of the common areas; as such, both types of residents should be owed the same duties.<sup>148</sup> Michigan should adopt the rulings of other jurisdictions and impose the duties of landlords—as to the common areas of the property—on condominium associations.

## CONCLUSION

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<sup>145</sup> *Martinez v. Woodmar IV Condominium Homeowners Ass'n, Inc.*, 941 P.2d 218, 220-21 (Ariz. 1997).

<sup>146</sup> *Sevigny v. Dibble Hollow Condo. Ass'n, Inc.*, 819 A.2d 844, 854 (Conn. Ct. App. 2003).

<sup>147</sup> See text accompanying notes 136-140.

<sup>148</sup> See *supra* Part III.

The statutory duties owed to tenants and condominium owners have the same roots in the common law. In fact, in common law contexts, unit owners and tenants are treated identically under the law as far as a land possessor's duties to residents using the common areas. Similarly, in both cases, the landlord or the condominium association is in the best position to properly maintain the common areas and so it makes little sense to hold a landlord to one standard while a condominium association is held to another as it relates to the common areas. Other states already treat condominium owners as tenants for the purposes of implied covenant statutes. There is no reason to believe that courts would be flooded by litigation if such statutory duties were applied to condominium associations as well; this application would only provide an alternative theory of liability for such claims. The Michigan statute in particular states that the statute should be construed liberally, which only lends support to the idea that residents who are not tenants in the strictest sense, could be protected by the statute. For all the reasons listed above, the Michigan courts should impose the statutory duties of landlords on condominium associations.