# COMMUNITY ASSOCIATION News

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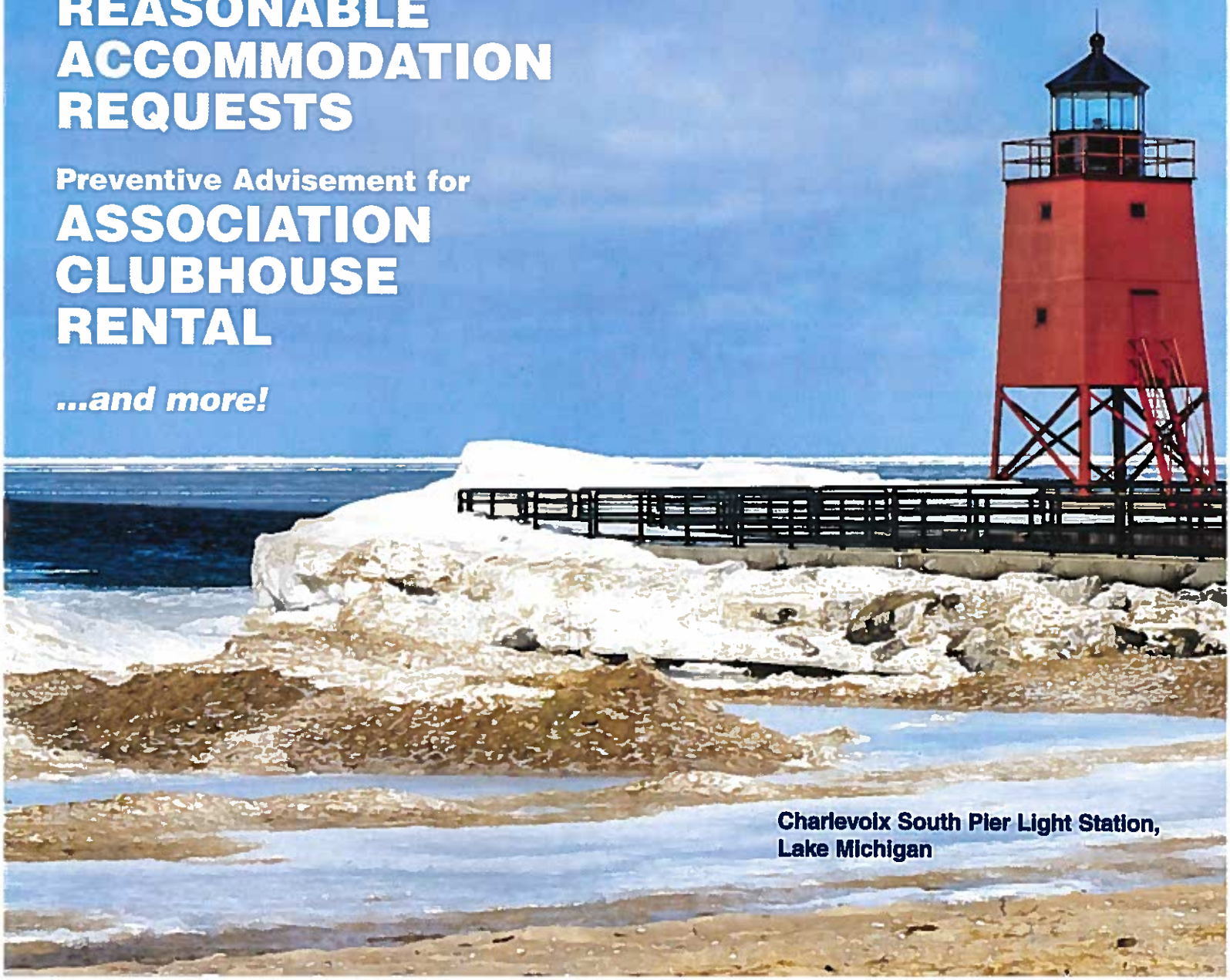

Charlevoix South Pier Light Station, Lake Michigan

# What Happens When Someone Slips and Falls on Condominium Property?

By Joe Wloszek

What happens if a co-owner slips and falls on the condominium premises? Does the co-owner have a right to sue the association or its property manager for failing to maintain the common areas in reasonable repair? Can the co-owner recover from the association (i.e. all of the other co-owners) for damages sustained on the condominium premises? Can the association use the Open and Obvious Doctrine as a defense in the condominium context? The answer to these questions may surprise you. A recently published Michigan Court of Appeals decision addresses these concerns and more.

On October 15, 2015, in a case of first impression, the Michigan Court of Appeals determined that a co-owner who slipped and fell on an icy, snow-covered sidewalk, resulting in severe injuries to the co-owner's hand and wrist, cannot recover damages from his association or its property manager for breach of contract or negligence. This decision represents a major victory for every association and property manager in Michigan. Co-owners should be cognizant of the repercussions of this case and should exercise additional caution as temperatures begin to fall in Michigan.

## General Rule: Open and Obvious Dangers are Not Recoverable

The general rule in Michigan is that open and obvious dangers are not recoverable absent 'special aspects' of the condition to justify imposing liability on a defendant. In *Lugo v Ameritech Corp, 464 Mich 512 (2001),* the Michigan Supreme Court held that a pothole in a parking lot was open and obvious and therefore the plaintiff could not recover for the damages sustained after a fall. Often times, Michigan attorneys will refer to this defense as the Open and Obvious Doctrine. Similar to open and obvious potholes in a parking lot, the general rule is that snow and ice are normally open and obvious in Michigan and do not present 'special aspects' to justify imposing liability on a defendant. See *Hoffner v Lanctoe, 492 Mich 450 (2012)* "Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces. Unfortunately, the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year." Since the publication of Lugo, plaintiff's attorneys have attempted to find new and creative ways to avoid the Open and Obvious Doctrine in order to recover damages for their clients.

## Exception: Statutory Duties Imposed by Law

As with most general rules, there are typically exceptions. In residential landlord-tenant cases, there is an exception to the Open and Obvious Doctrine. In *Allison v AEW Capital Mgt, LLP,* 481 Mich. 419 (2008), the Michigan Supreme Court held that "a defendant cannot use the 'open and obvious' danger doctrine to avoid liability when the defendant has a **statutory duty to maintain the premises...**" (emphasis added). Thus, if there is a statutory duty to

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*SLIP & FALL...from page 22.*

maintain the premises, then the Open and Obvious Doctrine does not apply as a defense. Specifically, *MCL 554.139* of the Landlord-Tenant Act states that:

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.
2. The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
3. The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

Thus, in residential landlord-tenant situations, there is a statutory duty imposed by law on the landlord to maintain the premises in reasonable repair unless modified by the parties to the lease under MCL 554.139(2). The question becomes, "Does a condominium association or its property manager have a statutory duty to maintain the condominium premises in reasonable repair?" In a recent decision, the answer is surprisingly no.





## Condominiums: No Statutory Duty

In *Francescutti v. Fox Chase Condominium Association, (2015) (Docket No. 323111),* Mr. Francescutti (the "Co-owner") was walking his dog on the condominium premises at approximately 11:00 P.M. and he slipped and fell. The co-owner sustained severe injuries to his hand and wrist and he sued his association and its property manager for breach of contract and negligence.

First, the co-owner argued that *MCL 554.139* imposes a duty on the Association and its property manager to maintain the property in reasonable repair. The co-owner's argument was premised on the Condominium Act, specifically MCL 559.136, which states that "The master deed may provide that undivided interests in land may be added to the condominium project as common elements in which land the co-owners may be tenants in common, joint tenants, or life tenants with other persons." The co-owner argued that MCL 554.139 should apply in the condominium context because "under MCL 559.136 of the Michigan Condominium Act, he is a tenant in common of the common areas of the development. And because that makes him a 'tenant,' that must make [the association] a 'lessor' of the land." The Michigan Court of Appeals disagreed and held that MCL 559.139 **only** applies to lessors of land and the association did not 'lease' land to the co-owner. Thus, the Court held that MCL 559.139 was inapplicable in the condominium context and there was no statutory duty imposed by law.

Second, the co-owner argued that he was a licensee to the common areas of the condominium premises. The Court of Appeals held that a licensee is a person privileged to enter *the land of another.* Since the co-owner owned the common areas with all of the other co-owners in common, simply, the co-owner did not enter the *land of another* and, thus, no statutory duty was owed by the association.

Third, the co-owner relied upon the association's Snow Removal Policy as the alleged basis for a 'duty' imposed on the association to maintain the condominium premises in reasonable repair. The Court of Appeals determined that the co-owner failed to identify any specific contractual language in support of a breach of contract claim. The Court of Appeals held that the Snow Removal Policy did not represent a contract that actually created a duty, much less any evidence that any such duty was actually breached.

## Conclusion

This recent, published decision represents an important protection in favor of associations and their property managers. co-owners should be aware of this decision and exercise additional caution on the condominium premises, especially as the weather begins to turn here in Michigan. While not addressed in this case, the question becomes whether *your* condominium bylaws or association's snow removal contract creates a contractual duty to maintain the premises in reasonable repair. Such a determination will be on a case-by-case basis and your association should review its bylaws and snow removal contracts with an experienced attorney. If you have any questions regarding a slip and fall or other damages sustained on the common areas of your condominium premises, please contact our office. ■

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