STATE OF MICHIGAN

IN THE SUPREME COURT

CHARLOTTE HOFFNER,

Appellee/Cross-

~~Cross~~ Plaintiff/Appellant,

and

Lower Court No. G-08-85-NO

BLUE CROSS AND BLUE SHIELD OF MICHIGAN

~~Third-Party~~ Plaintiff/Appellee

COA Docket No. 292275

-vs-

SC: Docket No. 142267

RICHARD LANCTOE and **LORI LANCTOE,**

Appellants/Cross-

~~Cross~~ Defendants/Appellees,

and **PAMELA MACK** and **TIFFANI K. AHO**
~~**a/k/a TIFFANI K. FONTECCHIO,**~~ and
MOUSIE, INC., d/b/a FITNESS XPRESS,

~~Cross~~ Defendants/Appellees.

Olc

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CROSS PLAINTIFF/APPELLANT CHARLOTTE HOFFNER'S APPLICATION FOR LEAVE TO CROSS APPEAL

XAPL

NOTICE OF HEARING

211

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PROOF OF SERVICE

FILED
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MICHIGAN SUPREME COURT

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Cross Plaintiff/Appellant Charlotte Hoffner seeks leave to appeal only from that portion of the 11/02/10 decision of the Court of Appeals which held that the Defendants/Appellees Fitness Xpress, Aho and Mack, were not possessors of the sidewalk because their lease did not include the sidewalk and, therefore, Cross Defendant/Appellee did not owe a duty to Plaintiff with respect to the sidewalk in question.

The decision of the Court of Appeals was clearly erroneous because Paragraph 19 of the lease specifically includes the sidewalks as part of the leased facility. That as a matter of law and fact, the sidewalk was part of the leased premises, and, said Defendants/Appellees did salt the sidewalk and, therefore, shared possession and control of the sidewalk with the landlord with respect to snow and ice removal and cannot delegate the duty to make the sidewalk safe for invitees.

The decision of the Court of Appeals should be reviewed and Cross Defendants/Appellees Aho, Mack and Fitness Xpress should remain in this lawsuit and not be dismissed.

STATEMENT OF APPELLATE JURISDICTION

The Court has discretionary jurisdiction of this appeal pursuant to MCR 7.301(A)(2). This appeal satisfies the criteria set forth in MCR 7.302 and warrants an order granting leave to appeal or peremptory relief.

The decision of the Court of Appeals regarding the possession of the sidewalk was clearly erroneous, will cause material injustice because the lease included the sidewalk as part of the leased premises and, therefore, the tenant of Cross Defendants/Appellees owed a non-delegable duty to the Cross Plaintiff/Appellant to keep the sidewalks safe.

There are no decisions in Michigan that address the situation where a tenant and landlord can share possession of control and, therefore, both be mutually liable in a premise liability case.

STATEMENT OF QUESTION PRESENTED

SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED WHEN IT RULED THAT BUSINESS CROSS DEFENDANTS/APPELLEES AHO, MACK AND FITNESS XPRESS DID NOT OWE A NON-DELEGABLE DUTY TO A BUSINESS INVITEE WITH A CONTRACTUAL RIGHT TO EXERCISE AT THE FACILITY COULD NOT PROPERLY BE INCLUDED AS DEFENDANTS DESPITE THE FACT THEY SHARED POSSESSION AND CONTROL OF THE COMMON SIDEWALK BY REASON OF A LEASE PROVISION WHICH INCLUDED SAID SIDEWALK AND MADE THE SIDEWALK PART OF THE LEASED PREMISES AND SAID CROSS DEFENDANTS/APPELLEES SALTED SAID SIDEWALK WHERE PLAINTIFF FELL.

Cross Plaintiff-Appellant says "Yes."

Cross Defendants-Appellees say "No."

INTRODUCTION

A. NATURE OF THE ACTION

This is a premises liability case. Plaintiff fell on an icy sidewalk in front of a fitness center's only entry door and hurt her back. She admitted the icy condition was open and obvious but wanted to work out so she opted to confront the condition to gain access to the center. The accident happened on 1/28/06 around 11:00 a.m.

The fitness center, known as Fitness Xpress, was operated by Mousie, Inc. The latter company was owned by Pamela Mack and Tiffany Aho. Defendants-Appellants, Richard and Lori Lanctoe, owned the building and property where Mousie, Inc. leased space for Fitness Xpress.

STATEMENT OF FACTS

Plaintiff brought this action for a back injury suffered in a slip and fall on an icy sidewalk in front of a fitness center's door. (Complaint ¶ 4-8) Plaintiff was a member of the fitness center (and thus an invitee) and was attempting to reach the door to access the center so she could exercise. Plaintiff named as defendants the fitness center and its landlord and charged them with failure to make the premises safe. (Complaint ¶ 6) Defendants moved for summary disposition on 5/5/09. The trial court denied the motion. (Order Denying Motion for summary Disposition, 5/15/09) The Court of Appeals granted defendants' application. (Order, 10/6/09) In an 11/2/10 decision, the Court affirmed in part, reversed in part, and remanded the case for further proceedings.

Plaintiff's accident happened on Saturday, January 28, 2006 around 11:00 a.m. in Ironwood, MI. The fitness center was operated by defendants Mack and Aho and owned by their

company, defendant Mousie, Inc. d/b/a Fitness Xpress. (Mack dep. pp 5-6; Aho dep. p 4) The fitness center was located in a rental unit of a building owned by defendants Richard and Lori Lanctoe (L.Lanctoe dep. pp 6, 12-13) There was only one entry door for fitness center members. (Mack dep. pp 16-17)

One lease states approximately 2,000 square feet of floor space in the building is leased. (Exhibit 7 to Defendants' 4/29/09 Reply to Plaintiff's Brief Opposing Motion for Summary Disposition) However, another lease form did not specify the leased premises. (Exhibit 5, 5A) There were other tenants in the building, too. (L. Lanctoe dep. pp 5-6) The sidewalk that plaintiff fell on ran the length of the building and was owned by the Lanctoes. (Exhibit 6 to Defendants' 4/29/09 reply to Plaintiff's Brief Opposing Motion for Summary Disposition) The latter also owned the building's parking lot. Each tenant of the building including the fitness center (and tenant customers) had use of the sidewalk and the parking lot. (L. Lanctoe dep. pp 22-23)

In both leases, paragraph 19 of the lease includes the sidewalk as part of the leased premises. The Lanctoes were responsible for snow removal from the building's sidewalk and parking lot although Mr. Lanctoe supplied the fitness center with a bucket of salt and center personnel would salt that portion of the common sidewalk in front of the fitness center. (L. Lanctoe dep. p 22, R. Lanctoe dep. p5, Mack dep. p 19; Exhibit (unnumbered) to Defendants 4/14/09 Motion for Summary Disposition.

Plaintiff and her sister Paula were both members of the fitness center. On the morning of the accident, plaintiff's sister picked her up and the two then drove to the center in Ironwood. (Pltf's dep. p 11) They parked in the parking lot owned by the defendants Lanctoes between the door and the window of the fitness center with the front of the vehicle facing the building. (Pltf's

dep. pp 19-20) Plaintiff got out of the vehicle and walked around the front of the vehicle about halfway, and then tried to cross the sidewalk to the fitness center's only customer entrance door. (Pltf's dep. pp 21-23)

The fitness center rented by Cross Defendants/Appellants Lanctoes appears to be rented to Pamela Mack for the operation of the exercise center. The leased space in the fitness center had one entrance door to the fitness center. (See Exhibit 1 - Deposition of Pamela Mack, pgs 16, 17). The sidewalk in front of the door or entrance way was covered with ice and was the only entrance to the exercise/fitness center. (See Exhibit 2, 3 and 4 - Interrogatories and Deposition of Pamela Mack, pgs. 13, 14; Deposition of Charlotte Hoffner, pgs. 21-28) There was no alternative route. Attached hereto is a copy of the lease. (See Exhibit 5, 5A and 6 - Lease and Deposition of Lori Lanctoe, pages 4-13). The first lease given to Plaintiff/Appellee did not have the first page filled out. At the deposition, the filled out page was produced. See Defendants/Appellants' Brief together with Plaintiff/Appellee's Affidavit (See Exhibit 7). Both state there was only one entrance door.

Plaintiff Charlotte Hoffner's Deposition Page 27, Lines 13 -25; Page 28, Lines 1-7

Q Okay. Take me through what happens after you fall. I assume Paula comes to your side –

A Yes.

Q – as does Patty?

A Yes, Patty came over, too, and then the woman from the inside came outside. And I screamed, and I told her: I can't move and that it was really hurting.

And the woman said that she hadn't salted the sidewalk. She didn't have any salt, and that Tiffany, I think was her name, was supposed to bring some on the

second shift.

Q Okay. And this is a statement that the woman from Fitness Xpress made to you?

A Yes.

Q And you don't know her name?

A No, they had different people there every time I went so. I didn't work with her. I just went around on the machines with my sister and Patty so.

ARGUMENT

THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED WHEN IT RULED THAT BUSINESS CROSS DEFENDANTS/APPELLEES AHO, MACK AND FITNESS XPRESS DID NOT OWE A NON-DELEGABLE DUTY TO A BUSINESS INVITEE WITH A CONTRACTUAL RIGHT TO EXERCISE AT THE FACILITY COULD NOT PROPERLY BE INCLUDED AS DEFENDANTS DESPITE THE FACT THEY SHARED POSSESSION AND CONTROL OF THE COMMON SIDEWALK BY REASON OF A LEASE PROVISION WHICH INCLUDED SAID SIDEWALK AND MADE THE SIDEWALK PART OF THE LEASED PREMISES AND SAID CROSS DEFENDANTS/APPELLEES SALTED SAID SIDEWALK WHERE PLAINTIFF FELL.

STANDARD OF REVIEW

This Court's review of the trial court's ruling on defendants' motion for summary disposition is de novo. The court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.166 (G)(5), in the light most favorable to the party opposing the motion. ***Maiden v Rozwood*****, 461 Mich 109; 597 NW2d 817 (1999).**

Plaintiff/Appellee's complaint against Defendants/Appellants Mack. Aho and Mousie Inc, is not barred because Defendants/Appellants were possessors of land for purposes of premises liability, and owed a nondelegable duty to Plaintiff/Appellee.

Michigan Civil Jury Instruction 19.10 states as follows and a copy is attached hereto (See Exhibit 12):

> Nondelegable Duty of Possessor or Occupier of Land
> Premises, or Place of Business
>
> A possess or occupier of [land/premises/a place of business] who owes a duty to [name of plaintiff may not delegate that responsibility to another and thus avoid liability.

The lease between the Defendant/Appellants Lanctoes and Mack at paragraph 19 provides that the leased premises includes the sidewalk in question. The Defendants/Appellants have admitted that they had a bucket of salt for their sidewalk in the front part of their business

establishment. In addition Defendant Tiffani Aho was to bring salt the morning of Plaintiff's injury. Clearly they shared possession and control of the sidewalk by reason of the lease and their actions by taking care of the sidewalk in front of their door.

The Court of Appeals relies on and cites *Divine v Al's Lounge, Inc.,* 181 Mich App 117, 448 NW2d 725 (1989, as support for their ruling that the Defendant owners of the fitness center business owed no duty to the Plaintiff by undertaking to salt the same. That case involves a fall on a public sidewalk. The rule in that case is that property owners have no duty to maintain public (emphasis added) sidewalks abutting their property free from natural accumulations of ice or snow unless the property owner undertakes to remove the ice and increases the hazard of walking across the sidewalk. In the present case the sidewalk was a private sidewalk made part of the leased premises and not a public sidewalk.

On page 8, paragraph 19 of the lease, the parties have agreed that the landlord shall be responsible to remove the snow from the leased facility including the roof, sidewalks and parking lots. The lease makes the sidewalks part of the leased facility. The premises or the leased property includes the sidewalks according paragraph 19 of the lease. The Defendants/Appellants cannot delegate through a lease their responsibility and duty to the Plaintiff/Appellee.

The Defendant/Appellants pursuant to Paragraph 19 and its action of salting the sidewalk are shared possessors of the common sidewalk area in front of their business which they and their business invitees use for ingress and egress. They also exercise control by having salt and salting the sidewalk. To take the position that the common sidewalk is not part of the leased premises ignores the lease and the Defendant/Appellee's actions as to the sidewalk.

The Defendant tenants having salted the sidewalk are under a duty to do so in an skillful manner.

In the case of *Schultz v Consumers Power Company* 443 Mich 445, 506 NW2d 175 (1993), the Court stated:

> It is well established that those who undertake particular activities or enter into special relationships assume a distinctive duty to procure knowledge and experience regarding that activity, person, or thing.

In the case of *Zychowski v A.J. Marshall Company, Inc.* 233 Mich App 229, 590 NW2d 301 (1999), the Court stated:

> A party may be under a legal duty when it voluntarily assumes a function that is not legally required to perform. *Baker v Arbor Drugs, Inc.*, 215 Mich App 198, 205, 544 NW2d 727 (1996). Once a duty is voluntarily assumed, it must be performed with some degree of skill and care. *Premo v General Motors Corp.*, 210 Mich App 121, 123, 533 NW2d 322 (1995).

CONCLUSION

The Cross Defendant/Appellees shared control and possession of the sidewalk in front of the fitness center business. The lease (paragraph 19) included the sidewalk as part of the leased premises and Defendants/Appellees Mack, Aho and the fitness center by its actions shared in the removal of ice from the sidewalk. There is no reason a landlord and business tenant cannot share possession and/or control of a common sidewalk and, therefore, Cross Defendants/Appellees also have a duty to business invitees.

RELIEF REQUESTED

For all the reasons stated above, Cross Plaintiff/Appellant's Application for Leave to Appeal should be granted.

Dated 1/10/14

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