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STATE OF MICHIGAN

COURT OF APPEALS

DEBRA SEDLECKY,

Plaintiff-Appellant,

v

SUN COMMUNITIES, INC., SUN COMMUNITIES FUNDING LIMITED PARTNERSHIP, and SUN CUTLER ESTATES, LLC,

Defendants-Appellees.

UNPUBLISHED
August 20, 2020

No. 348520
Kent Circuit Court
LC No. 18-005610-NO

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

In this negligence and premises liability action, plaintiff appeals as of right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim on which relief can be granted) and (C)(10) (no genuine issue of material fact, and the movant is entitled to judgment as a matter of law) in favor of defendants. We reverse the trial court's order dismissing plaintiff's claims and remand for further proceedings.

In 2015, plaintiff lived in a residential mobile home community owned and operated by defendants. The community has a swimming pool available for use by community residents and their guests. On July 5, 2015, while entering the swimming pool from one of its stairways, plaintiff slipped and fell, incurring injuries. Plaintiff filed a complaint in 2018 against defendants alleging that they violated Michigan administrative codes and their statutory duties to keep the premises in reasonable repair and ensure they were fit for their intended use, and that defendants maintained an unreasonably dangerous condition on their land. Specifically, plaintiff alleged that the stairway in the pool did not have slip-resistant treads, did not have steps with contrasting colors on the front edge, did not have a handrail that was reachable for the length of the stairway, and did not have a handrail in compliance with applicable handrail codes. Plaintiff further alleged that the stairs were slippery because of a lack of slip-resistant treads and defendants' failure to regularly clean the pool, which created a "slippery condition to exist on the stairway leading into the pool."

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10).[1] They argued that video footage established that plaintiff fell due to her own physical limitations and not because of any issue with the stairs themselves, and that defendants violated no statutory duties. Plaintiff responded that genuine issues of material fact existed pertaining to problems with the stairs and the pool's maintenance, that the cause of her fall was a question of fact for the jury to determine, and that the pool stairs were not, in fact, fit for their intended use. The trial court granted summary disposition in favor of defendants, opining that the slippery nature of the stairs was open and obvious, subject to no special aspects, and that the steps, which constituted a common area, were fit for their intended use such that no statutory violations occurred. The trial court denied plaintiff's later motion for reconsideration, and this appeal followed.

On appeal, plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition as to her statutory claim premised upon MCL 554.139(1)(b) in light of this Court's opinion in *Estate of Trueblood v P & G Apartments, LLC*, 327 Mich App 275; 933 NW2d 732 (2019). We agree.

We review de novo a trial court's decision to grant summary disposition. *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (citations and quotation marks omitted).]

When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), a court considers "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). Summary disposition "is appropriate under MCR 2.116 (C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, reasonable minds could differ on the issue." *Trueblood*, 327 Mich App at 285.

MCL 554.139(1) provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:

[1] Defendants filed two separate motions for summary disposition approximately two weeks apart and the trial court considered both motions at a single hearing.

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

Our Supreme Court gave due regard to the Legislature's use of "premises and all common areas" in (1)(a) but only "premises" in (1)(b). See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 431-433; 751 NW2d 8 (2008). The *Allison* Court defined "common areas" as "those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants. A lessor's duties regarding these areas arise from the control the lessor retains over them." *Id*. at 427. It further defined "premises" as "a tract of land including its buildings or a building or part of a building together with its grounds or other appurtenances." *Id*. at 432 (quotation marks and citation omitted). However, the *Allison* Court determined that " 'premises' does not encompass 'common areas' and that the covenant to repair under MCL 554.139(1)(b) does not apply to 'common areas.' " *Id*. at 432, 435.

However, in *Trueblood*, we concluded "that a landlord's covenant to comply with local health and safety laws is distinct from its covenant to make reasonable repairs." *Trueblood*, 327 Mich App at 295. The *Trueblood* Court interpreted *Allison*'s holding to only apply "to the covenant to make reasonable repairs, not to the covenant to comply with local health and safety laws." *Id*. at 294. Therefore, the use of the term "premises" contained in the covenant to comply with local health and safety laws did not exclude "common areas" as the covenant to make reasonable repairs did. *Id*. at 295-296. It was undisputed that the swimming pool in question was considered a common area.

The complaint contained allegations, which must be "accepted as true and construed in a light most favorable to the nonmovant," *Maiden*, 461 Mich at 119, that defendants failed to comply with Michigan statutes and administrative codes. Specifically, plaintiff cited the administrative rules governing public swimming pools, R 325.2134(4), which the Michigan Department of Environmental Quality (MDEQ) was given authority to regulate under the Public Health Code, MCL 333.1101 *et seq*., to allege that defendants did not have slip-resistant treads on the pool stairs, that the front edge of each step was not marked in a color that contrasted with the background, and that the handrail was not reachable for the length of the stairway. Under *Trueblood*'s holding, defendants were required to comply with local health and safety laws "where the premises were located." *Id*. at 295.

Moreover, a motion under MCR 2.116(C)(8) disallows the moving party from relying on affidavits, depositions, admissions, or other documentary evidence to support its position. See MCR 2.116(G)(2). Only the pleadings may be considered, which include the complaints, cross-claims, counterclaims, third-party complaints, answers, and replies to answers. See MCR 2.110(A). Therefore, defendants cannot rely on the MDEQ inspection to support dismissal of plaintiff's (1)(b) claim, and the trial court could only rely on plaintiff's complaint and defendants' answer. Contained in plaintiff's complaint were the well-pleaded facts that defendants did not

comply with one of the administration codes governing public swimming pools. Therefore, dismissal under MCR 2.116(C)(8) was inappropriate.

Furthermore, we conclude that dismissal under MCR 2.116(C)(10) was also inappropriate. In considering a motion for summary disposition pursuant to MCR 2.116(C)(10), the trial court may consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. See MCR 2.116(G)(5); *Maiden*, 461 Mich at 120. Importantly, the trial court's consideration is "in the light most favorable to the party opposing the motion." *Maiden*, 461 Mich at 120. Plaintiff submitted two affidavits, one from herself and one from the pool attendant. Contained in the pool attendant's affidavit were statements that "[r]ubbery blue non-slip paint marks the edge of the pool steps and the point at which the pool transitions to a greater depth. During the summer of 2015, I constantly had to clean pieces of this blue substance out of the pool's filters because it was flaking off." Plaintiff's affidavit also contained a statement that she "did not see the hazardous condition of the pool surfaces, stairs, and handrail, despite careful observation, before or after [she] fell." There was also photo evidence of the stairs that depicted there was little to no slip-resistant tread on the second step, which was the step that plaintiff was stepping to when she fell, and there was little to no marking on the front edge of the step that contrasted with the background.

Defendants' reliance on the MDEQ inspection and video footage of plaintiff's fall to demonstrate that no genuine issue of material fact exists is misguided. The MDEQ inspection came approximately two weeks before plaintiff's accident, which could indicate that the stairway was noncompliant at the time plaintiff fell. Plaintiff offered an affidavit from the pool attendant that stated that she had to constantly clean the pool filter of the blue non-slip paint marks because it was constantly flaking away. This could indicate that, at the time of plaintiff's fall, the second step no longer contained the blue non-slip mark as required by the regulation. Moreover, plaintiff's photo exhibits demonstrate that the second step has little to no marking. With respect to the video, defendants advance an argument concerning only the *weight* of such evidence. The video is not dispositive of whether plaintiff slipped, as she contends, or whether plaintiff's knee gave out, which defendants contend. All that the video provides is a question of fact for the jury to decide as to the cause of plaintiff's fall. See *Highfield Beach at Lake Michigan v Sanderson*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 343968 and 345177); slip op at 8 ("For purposes of MCR 2.116(C)(10), a trial court is not allowed to weigh the evidence, assess credibility, or resolve factual disputes.").

Still, defendants assert that *Trueblood* was wrongly decided and contradicts our Supreme Court's holding in *Allison*. Defendants invite us to disregard the rule of stare decisis, which we decline to do. A published opinion of this Court has precedential effect under the rule of stare decisis and binds lower courts and tribunals. See *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). Likewise, a decision of this Court published on or after November 1, 1990, binds subsequent panels of this Court. See MCR 7.215(J)(1); see also *Allison*, 481 Mich at 435-438 (discussing the circumstances under which a decision of the Court of Appeals becomes the rule of law under MCR 7.215(J)(1)). Until and unless the Supreme Court overrules our decision in *Trueblood*, "all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." See *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). And, our Supreme Court denied leave to appeal (see *Estate of Trueblood v P&G Apartments, LLC*, 937 NW2d 687 (2020)), which created

binding precedent because the *Trueblood* decision became a final adjudication. See MCR 7.305(H)(3) ("If leave to appeal is denied after a decision of the Court of Appeals, the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms."); see also *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010). Because *Trueblood* is binding precedent, we cannot refuse to follow the rule of law established.

Plaintiff also argues that the trial court erred in granting defendants' motion for summary disposition under MCR 2.116(C)(10) with respect to her MCL 554.139(1)(a) claim. Again, we agree. MCL 554.139(1)(a) provides, in relevant part:

> (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.

In *Allison*, as aptly summarized by the *Trueblood* opinion,

> our Supreme Court addressed the analytical framework to be used when determining liability under MCL 554.139(1)(a). First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there could be "reasonable difference of opinion regarding" whether the conditions made the common area unfit for its intended use. [*Trueblood*, 327 Mich App at 289, quoting *Allison*, 481 Mich at 430.]

In this case, as noted above, it was undisputed that the swimming pool in question was considered a common area under MCL 554.139(1)(a). With respect to the intended use of the common area, as this Court stated, "[t]he primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure." *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). The trial court in this case also stated that "the intended use of the stairs is entry and exit from the pool. MCL 554.139(1)(a) requires that the stairs be suited for the purpose of entry and exit."

With the first two steps in the analytical framework satisfied, it must be determined whether there can be "reasonable difference of opinion regarding whether the conditions made the common area unfit for its intended use." *Trueblood*, 327 Mich App at 289 (quotation marks omitted). As noted by the *Hadden* Court, "a tenant uses a stairway for its intended use solely by walking up and down it." *Hadden*, 287 Mich App at 132. Defendants and the trial court rely on the video footage that multiple people used the stairs before and after plaintiff's fall to support their finding that the stairs were fit for their intended purpose. However, such evidence is not dispositive, as such evidence

> does not overcome the other evidence. Specifically, if the [stairs were] completely covered in [an unusually slippery/oily substance], then [the stairs] were not fit for [their] intended use. That others had been able to walk on the [stairs] without incident might have suggested that the [stairs were] not completely covered in [an unusually slippery/oily substance], but it might also have suggested that the others

> had been walking more carefully on the [stairs] because given that plaintiff had slipped, they were aware that the [stairs were] slippery. [*Trueblood*, 327 Mich App at 292.]

As in *Trueblood*, plaintiff presented "more evidence than simply the presence of [normally slippery stairs] and someone falling." *Id*. at 291-292. The trial court's reliance on the fact that "[t]he very nature of pool stairs is that they are under water" ignores plaintiff's evidence that the stairs were *unusually* slippery. Although MCL 554.139(1)(a) does not require that the stairs be in perfect condition, but must provide access in and out of the pool, an unusually slippery stairway presents more than a mere inconvenience to pool goers. See *Hadden*, 287 Mich app at 132. Likewise, plaintiff's evidence must be taken in a light most favorable to her for purposes of an MCR 2.116(C)(10) motion, and we find that "[r]easonable minds could conclude that the presence of [an unusually slippery substance—possibly caused by the failure to allow fresh paint to fully dry—] posed a hidden danger that denied tenants reasonable access [to the pool] and rendered the stairway unfit for its intended use." *Hadden*, 287 Mich App at 132.

Therefore, in light of plaintiff's evidence, reasonable minds could differ on whether defendants breached their duty under MCL 554.139(1)(a) "to maintain [the stairs] in a manner that was fit for [their] intended use." If there was an unusually slippery substance that created a higher risk of slipping than normal pool stairs present, then defendants would have breached their duty to maintain the pool stairs in a manner fit for their intended use. Accordingly, a genuine issue of material fact existed whether defendants breached their duty under MCL 554.139(1)(a), and summary disposition under MCR 2.116(C)(10) was inappropriate. Similarly, because we conclude that a genuine issue of material fact exists whether defendants violated their statutory duties under MCL 554.139(1), the trial court erred in granting defendants' motion for summary disposition on the basis of the open and obvious danger doctrine. See *Trueblood*, 327 Mich App at 289 ("[T]he open and obvious danger doctrine is not available to deny liability for a statutory violation under MCL 554.139(1)."") (quotation marks and citation omitted; alteration in original).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Anica Letica