STATE OF MICHIGAN

COURT OF APPEALS

PAUL DONALD MORRIS, II,

Plaintiff-Appellant,

v

JENNY L. FREDENBURG, HARVEY MEYER, and ROSALYN MEYER, Jointly and Severally,

Defendant-Appellees.

UNPUBLISHED
October 25, 1996

No. 186186
LC No. 93-013291-NO

Before: Corrigan, P.J., and Taylor and D. A. Johnston,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants. We affirm.

On August 16, 1993, a fire ignited in the upstairs apartment of a two-story wood frame house, owned by defendants, which was divided into an upstairs and a downstairs apartment. The tenants of the upstairs apartment were plaintiff and his brother, Anthony Morris who had moved into the apartment in March, 1990. Plaintiff had lived in the apartment with his brother for about one year prior to the fire.

Plaintiff sued defendants for injuries sustained as a result of the fire. His complaint contained five counts: negligence (Count I); premises liability (Count II); breach of covenants and warranties (Count III); breach of an assumed duty of repair (Count IV); and breach of the covenant of quiet enjoyment (Count V). This appeal is taken only as to the first four counts. As to Count V, plaintiff has not made any argument and, thus, the appeal as to this count is considered waived.

Plaintiff first argues that genuine issues of material fact precluded summary disposition, pursuant to MCR 2.116(C)(10), on Counts I through IV. In particular, he asserts that defendants had constructive notice of a wiring defect that caused the fire and, thus, counts I through IV are viable.

The circumstances under which a landlord will be liable to a tenant for injuries resulting from a defect in the premises, regardless of the theory pleaded, are as follows:

* Circuit judge, sitting on the Court of Appeals by assignment.

> where: (1) *the lessor knew or should have known of the existence of the defects;* (2) the lessor realized or should have realized the risk of physical injury arising from the defect; (3) the lessor conceals or fails to disclose the existence of the condition to the lessee; and (4) *the defect is not observable to the lessee.* [*Evans v Van Kleek*, 110 Mich App 798, 803; 314 NW2d 486 (1981) (emphasis added).]

Further, a landlord is under no duty regularly to inspect the premises looking for defects; he is obliged to repair only those defects of which the tenant complains or which the landlord discovers on his own through casual inspection. *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978).

These doctrines obligated plaintiff to offer evidence, sufficient to show a genuine issue of material fact, that defendants had actual or constructive notice or knowledge of the wiring defect. He produced none that rose to the level of a genuine issue of a material fact. Evidence that three inches of a plastic-coated wire partially sticking through the molding of the outside door jam near the wall switch which was visible to the naked eye is insufficient to show notice or knowledge of defect of a character to be discovered by defendants on casual inspection. Further, plaintiff produced no evidence of a complaint to defendants regarding the exposed wire which, as they argue the motion, caused the fire [1] In addition, without regard to the issue of notice, defendants were entitled to summary disposition on the separate ground that plaintiff himself knew of the exposed wire. *Evans, supra* at 803.

Plaintiff asserts that Count III, breach of the covenant of fitness and repair, does not have a notice of defect prerequisite. He argues that MCL 554.139; MSA 26.1109, which provides that in every residential lease the lessor covenants to keep the premises in reasonable repair, has no notice requirement and one should, accordingly, not be read into it. In support of this proposition, plaintiff cites *Mobil Oil Corp v Thorn*, 401 Mich 306, 312; 258 NW2d 30 (1977), where our Supreme Court altered the previously existing common law set forward in *Kuhk v Green*, 219 Mich 423; 189 NW 25 (1922), by allowing recovery under breach of covenant to repair clauses not only in contract, but in tort. In particular, the court adopted 2 Restatement Torts 2d, § 357, which provides that a lessor is liable in tort for the physical harm caused by a condition of disrepair of the premises if (a) the lessor contracted by covenant to keep the premises in good repair, (b) the disrepair created an unreasonable risk of harm, and (c) the lessor failed to exercise reasonable care to perform his contract. Plaintiff overlooked that notice is indeed discussed and is required. Comment (d) of Restatement § 357 states:

> Unless it [the contract] provides that the lessor shall inspect the land to ascertain the need of repairs, a contract to keep the premises in safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need of repairs.

Accordingly, it cannot be said that *Mobil* stands for the proposition that no notice need be shown by the lessee. In fact, the opposite is the case--it stands for the proposition that notice is required.

Moreover, MCL 554.139; MSA 26.1109, is in derogation of the common law. As such, it must be strictly construed, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which, in plain and explicit terms, authorizes the

action to be maintained. *Yount v National Bank of Jackson*, 327 Mich 342, 347; 42 NW2d 110 (1950). Plaintiff has not met that burden. The common law held that the lessor is liable only for latent defects of which he knows or has reason to know. *Raatikka, supra.* The cited statute does not eliminate the notice requirements and, thus, the notice requirements are still part of our law and apply in lessor liability situations such as this one.

Plaintiff further argues, in an effort to salvage the premises liability count (Count II), that when the trial court ruled the wiring space at issue is not a common area under control of the landlord, it erred. In support of this proposition, plaintiff cites Michigan's Housing Law, MCL 125.401, *et seq.;* MSA 5.2771, *et seq*. In particular, he argues that the term "common elements" in the statute includes electrical systems. This argument is unavailing.

First, MCL 125.401, *et seq.;* MSA 5.2771, *et seq.*, does not appear to apply to Brighton Township.[2] Nevertheless, even assuming the Michigan Housing Law is applicable, the trial court's grant of summary disposition was proper because a cause of action under the law requires proof of notice, *Raatikka, supra* at 430, and, as previously discussed, plaintiff failed to make that showing.

Further, the trial court appropriately ruled, without regard to the statute, that the wiring space between the walls and above the ceiling was not, as a matter of law, a common area.[3] In support of his argument that the electrical system was a common area, plaintiff cites several cases, none of which support the proposition he advocates. *Williams v Johns*, 157 Mich App 115; 403 NW2d 516 (1987), involved a fire in a stairwell; and *Conerly v Liptzen*, 41 Mich App 238; 199 NW2d 833 (1972), involved a malfunctioning elevator. Neither of these cases states expressly or by implication that an electrical system is a common area. *Vandenberg v Loseth*, 857 F Supp 1193 (WD Mich, 1994), involved a propane system that exploded; however, that opinion contains no language describing that system as a common area. In *Samson v Saginaw Professional Building, Inc*, 393 Mich 393, 407; 224 NW2d 843 (1975), which involved a criminal attack in an elevator, the Michigan Supreme Court described common areas as "the halls, lobby, stairs, elevators, etc. [which] are leased to no individual tenant and remain the responsibility of the landlord." In short, none of the cases which plaintiff cites support his position that an electrical system is a common area. Our reading of these cases, as well as *Williams v Cunningham Drug*, 429 Mich 495, 499; 418 NW2d 381 (1988), cause us to conclude that to be a common area, it is necessary that a defendant could physically occupy it. For example in *Williams v Cunningham, supra*, the Court stated at page 499:

> [A] landlord may be held liable for an unreasonable risk of harm caused by a dangerous condition in the area of common use retained in his control such as lobbies, hallways, stairways, and elevators.

Further, while 2 Restatement Torts 2d, § 360, Comment (d) expansively views a common area, its view is not so broad as to include building systems within the meaning of common area:

> The rule stated in this Section applies not only to the hall, stairs, elevators, and other approaches to the part of the land leased to the lessee as a flat, office, or room in a tenement or boardinghouse, but also to such other parts of the land or building to the

> use of which by the express or implied terms of the lease the lessee is entitled, usually in common with other lessees, such as a bathroom in a boardinghouse and the roof or yard of a tenement building or apartment house.

Accordingly, the trial court did not err when it determined as a matter of law that the wiring space in the present case was not a common area, and the summary disposition as to this premises liability claim was proper.

Plaintiff's final argument is that the grant of summary disposition was premature as he had not had an opportunity to timely examine the physical evidence which was in possession and control of defendants. We disagree.

Plaintiff failed to preserve this issue, and this constitutes a waiver. *Booth Newspapers v University of Michigan Board of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Furthermore, even if it had been preserved, the issue would not have precluded granting summary disposition. While the physical evidence may have assisted plaintiff in trying to show that the exposed wire was the same wire that caused the fire, it would have not assisted plaintiff in showing actual or constructive notice of the defect on the part of defendants.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston

[1] While the trial court stated that, based on the investigative reports the exposed wire could not have been the wire that caused the fire, we have assumed in the preceding discussion that the exposed wire is the one that caused the fire. Yet, even with that assumption, plaintiff's case is fatally flawed for the reasons set forward.

[2] Section 1 of the statute, MCL 125.401; MSA 5.2771, provides that it does not apply uniformly throughout the state, but only to those cities or organized villages with a population of at least 100,000, and to that territory that is within a 2 ½mile radial distance of the boundary of that city or organized village. However, cities, villages, and townships, with less than the requisite population, may adopt the law through legislative resolution. Plaintiff provides no authority or argument in his brief to show that Brighton Township's population, size, or location brings it within the terms of the statute.

[3] The trial court incorrectly cited as authority MCR 2.116(C)(8) rather than (C)(10). This is not dispositive because a lower court decision that is proper in all respects, save for a reference to an inapplicable court rule rather than an applicable one, will not be a basis for reversal. *Cosgrove v Lansing Board of Education*, 164 Mich App 110, 113; 416 NW2d 316 (1987).