# STATE OF MICHIGAN

# COURT OF APPEALS

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DEANNA DITTO

Plaintiff-Appellant,

v

GLEN ADAMS,

Defendant-Appellee.

UNPUBLISHED
November 22, 1996

No. 187086
LC No. 94-231-NO

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Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

This is a premises liability action in which plaintiff stepped off the porch of a single-family dwelling into a hole in the ground beside the porch. She was assisting a tenant move into a home owned by defendant on July 5, 1993. Plaintiff alleged that defendant owed her a duty to keep the premises safe or to warn of the hidden danger. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) and asserted that he did not owe a duty to plaintiff because he did not retain possession and control over the leased premises. Plaintiff responded that the hole also constituted a nuisance, and defendant was responsible for its existence, and owed a duty to warn. The trial court entered an order on June 6, 1995, granting defendant's motion. It also treated plaintiff's allegation of nuisance as a motion to amend and denied the motion. Plaintiff appeals as a matter of right from this order and challenges both rulings.

Summary disposition may be granted when, "except as to the amount of damages there is no genuine issue as to any material fact." MCR 2.116(C)(10). On appeal, a trial court's grant of summary disposition will be reviewed de novo in order to determine whether the moving party was entitled to judgment as a matter of law. *IBEW, Local 58 v McNulty,* 214 Mich App 437, 442; 543 NW2d 25 (1995).

To sustain a cause of action based on negligence, the plaintiff must establish that the defendant owed the plaintiff a duty; the existence of a duty is a question of law for the court. *Hammack v Lutheran Soc Services*, 211 Mich App 1, 4; 535 NW2d 215 (1995). A landlord who has

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

surrendered possession of a leasehold has no obligation to maintain the premises in repair. *Williams v Detroit*, 127 Mich App 464, 468; 339 NW2d 215 (1983).

Defendant presented deposition testimony that he had relinquished control of the premises to his tenant before plaintiff injured herself while helping the tenant move into the single-family dwelling. Plaintiff, as the party opposing the motion, was required to respond to that evidence with affidavits or other evidentiary materials. *McCart v Thompson, Inc*, 437 Mich 109, 115-116; 469 NW2d 284 (1991). However, plaintiff presented no such evidence. Therefore, plaintiff failed to meet her burden, and the trial court properly granted summary disposition on the negligence claim. Plaintiff failed to rebut defendant's testimony that he had surrendered possession of the leasehold by July 5, 1993.

Plaintiff also contends that the trial court erred when it did not allow her to amend her complaint to include a claim for nuisance. We agree. The grant or denial of leave to amend is within the trial court's discretion, but should be freely granted when justice requires. *Fyke & Sons v Gunter Co*, 390 Mich 649, 656, 658; 213 NW2d 134 (1973); *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

The trial court ruled that a nuisance claim would be futile because plaintiff did not have a property interest in the subject premises. However, an injured party may bring a nuisance cause of action against a landlord even though the landlord had relinquished complete control, possession and use of the premises where, at the time the premises are transferred, a hidden danger exists and the landlord knew or should have known of the danger and failed to apprise the tenant of it. *Bluemer v Saginaw Oil Service*, 356 Mich 399, 410-416; 97 NW2d 90 (1959); *McCurtis v Detroit Hilton*, 68 Mich App 253, 256; 242 NW2d 541 (1976). This liability also extends to others who are rightfully on the premises, like a lessee's social guest. *Bluemer, supra* at 416. In *Quinlivan v Great Atlantic & Pacific Tea Co.,* 395 Mich 244 (1975), and again confirmed in *Riddle v McLouth Steel Products*, 440 Mich 85 (1992), the supreme court adopted 2 Restatement Torts, 2d, § 343 which reads as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Accordingly the plaintiff was able to state a claim for premises liability. The lessor had a duty to "discover any possible dangerous conditions of which the invitor is not aware and take reasonable precaution" to protect those rightfully on the premises from dangers foreseeable. *Hammack v Lutheran Soc. Services*, 211 Mich App 1, 6, (1995). It is the duty of the premises owner to inspect the premises to discover possible defects. *Kroll v Katz*, 374 Mich 364, 373, (1965). That duty extends to warning of hidden or latent defects of which the premises owner knows or ought to know and of which the invitee or social guest is unaware. *Riddle, supra* at 95.

In order to establish a nuisance in fact it is necessary to show that the defendant is responsible for a, "dangerous, offensive, or hazardous condition". *Chapin v Coloma Township,* 163 Mich App 614 (1987);___NW2d ___. A nuisance in fact may be created by negligent or intentional conduct and its existence is a question of fact for the trier of fact. *Ford v Detroit,* 91 Mich App 333; ___NW2d___.(1979). Because it is possible for plaintiff to present a legitimate claim for recovery on a nuisance theory, defendant's denial that he was aware of any dangerous condition was not determinative. The trial court abused its discretion in refusing to allow plaintiff to amend her complaint on the nuisance claim.

Affirmed in part, reversed in part and remanded for further proceedings consistent with the above. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kenneth W. Schmidt