# STATE OF MICHIGAN

# COURT OF APPEALS

MARY SUMMERS ANDERSON, Individually and as Next Friend of CHRISTOPHER A. KARAFA, a minor, and KENT ANDERSON,

Plaintiffs-Appellants,

v

ARK ENTERPRISES, ARK REALTY LIMITED PARTNERSHIP d/b/a THE BOULEVARD APARTMENTS, ROBERT D. KOSS, KENNETH R. KOSS, AUSTIN J. KOSS, SR. and AUSTIN J. KOSS, JR.,

Defendants-Appellees.

UNPUBLISHED
June 13, 1997

No. 188290
Oakland Circuit Court
LC No. 93-466709-NO

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the circuit court granting summary disposition in favor of defendants and a subsequent order denying plaintiffs' motion for rehearing or reconsideration. We reverse and remand.

I

Plaintiff Mary Summers Anderson signed a residential lease with defendants, owners and managers of an apartment complex, in March 1990 and a second lease in April 1991. She lived in the Boulevard Apartments in Auburn Hills with her son, Christopher Karafa. The second lease expired at the end of February 1992, and she then continued in the apartment on a month-to-month basis for several more months. In December 1990, Mary began to experience stomach pain, nausea, and vomiting. These symptoms and others continued throughout her occupancy of the apartment. Her son also had episodes of stomach pain, leg cramps, difficulty in concentration, and dizziness. She

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

temporarily moved to her parents' home in October 1991, but again experienced the symptoms when she returned to the apartment. Mary saw numerous doctors, but her physical condition continued to deteriorate. In June 1992, both she and her son were diagnosed as having unacceptable levels of arsenic in their systems.

Mary told defendant Austin J. Koss, Jr. that she suspected that her health problems may be caused by environmental contaminants in the apartment in late May or early June 1992. She later informed defendants that she intended to have the apartment tested for toxins. An independent laboratory hired by Mary found a "significant amount" of arsenic in dust samples taken from the air vent in the master bathroom and the fan in her son's bathroom. Mary also contacted the City of Auburn Hills housing department and the Oakland County Health Department. Oakland County employees collected samples from the apartment and sent them to the Michigan Department of Public Health's Center for Environmental Health Sciences. The state agency found no arsenic in the samples, although they had not taken samples from the air vents or fans in the bathrooms. Mary contends that her symptoms persist to varying degrees and that she continues to have difficulty with cognitive functions, which is consistent with arsenic poisoning.

Plaintiff Kent Anderson was not married to Mary at the time that she lived at the Boulevard Apartments.[1] Kent Anderson did spend a great deal of time at the apartment with Mary. Kent Anderson was also found to have arsenic in his body. Therefore, Kent Anderson's claims in this case are not merely derivative. However, we do note that the lease in this case was between only Mary Anderson and defendants.

Plaintiffs filed their complaint on December 1, 1993, alleging counts of breach of contract, breach of implied and statutory covenants, unlawful interference with possession,[2] constructive ejection, and violation of the Michigan Consumer Protection Act (MCPA). They then filed an amended complaint that added a count of negligence. Defendants later moved for summary disposition regarding all of the claims. The trial court granted summary disposition to defendants pursuant to MCR 2.116(C)(8) on all claims except constructive ejection, for which it granted summary disposition to defendants pursuant to MCR 2.116(C)(10).

II

We review de novo a trial court's decision on a motion for summary disposition. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996).

A motion under MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. All well-pleaded allegations in the opposing party's pleadings must be accepted as true, and only if the allegations fail to state a legal claim will summary disposition under MCR 2.116(C)(8) be valid. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993).

A motion brought under MCR 2.116(C)(10), on the other hand, tests the factual basis underlying the plaintiff's claim. *Id.*, p 374. A court reviewing such a motion must consider the

pleadings, affidavits, depositions, admissions, and any other documentary evidence presented to it in favor of the party opposing the motion. *Id.* The court's task is to review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

III

Plaintiffs first argue that the trial court erred in granting summary disposition because their complaint set forth a cause of action for breach of contract. The trial court held that defendants' only duties owed to plaintiffs were outlined in the lease agreement, which contained an exculpatory clause. Michigan's Truth in Renting Act, MCL 554.633; MSA 25.164(33), provides that a rental agreement cannot contain a clause that "exculpates the lessor from liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law." Michigan's housing laws -- including MCL 125.471; MSA 5.2843 which covers the plumbing, heating, ventilating and electrical systems of residential premises -- impose a duty on owners to keep the property "in good repair." In *Rome v Walker*, 38 Mich App 458; 196 NW2d 850 (1972), this Court stated that since the enactment of MCL 554.139; MSA 26.1109:

> Every lease of a residential premises must now contain a covenant on the part of the landlord to keep the premises in reasonable repair and to comply with applicable health and safety laws. The inclusion of the covenants to repair and comply with safety laws is no longer a matter of individual contract but one of statutory mandate. [*Id.* at 462.]

Therefore, residential leases now contain a statutorily imposed covenant to repair. These covenants are imposed by MCL 554.139; MSA 26.1109, and by such specific housing statutes as MCL 125.471; MSA 5.2843. Unlike the common law rule regarding express covenants to repair, these covenants extend to areas of the leasehold under the control of the tenant because the statutory duty is imposed "regardless of possession and control." *Crawford v Palomar*, 7 Mich App 21, 26; 151 NW2d 236 (1967).

Accordingly, the trial court erred in holding that the exculpatory clause in the lease deprived plaintiffs of a contractual claim against defendants. Plaintiffs have a breach of contract claim pursuant to the Truth in Renting Act, as a statutorily imposed duty. Summary disposition on this claim was improperly granted pursuant to MCR 2.116(C)(8).

IV

Plaintiffs next contend that the trial court erred in granting summary disposition to defendants regarding the claim of breach of implied and statutory covenants. The trial court found that MCL 554.139; MSA 26.1109 did not provide for damages for personal injury and that plaintiff had therefore failed to state a claim for which relief can be granted.

However, the trial court ignored the application of MCL 125.536(1); MSA 5.2891(16)(1), which provides:

> When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling, whether a portion designated for the exclusive use and occupation of residents or a part of the common areas, where such condition exists in violation of this act, any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition. When the condition is a continuing interference with the use and occupation of the premises, the occupant shall also have injunctive and other relief appropriate to the abatement of the condition.

Our Supreme Court has declared that Michigan's housing law, MCL 125.401 *et seq.*; MSA 5.2771 *et seq.*, is a remedial statute and "should be liberally construed in favor of the persons it was intended to protect." *Morrison v Brown*, 360 Mich 460, 465; 104 NW2d 223 (1960). MCL 125.536; MSA 5.2891(16) clearly provides for damages suffered because of the conditions of the premises.

Additionally, plaintiffs' failure to specifically plead either MCL 125.471; MSA 5.2843 or MCL 125.536; MSA 5.2891(16) under their claim for breach of a statutory covenant does not by itself defeat their claim. Plaintiffs' complaint contains "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B).

Accordingly, plaintiffs have stated a claim for which relief can be granted, breach of statutory covenants under MCL 125.536; MSA 5.2891(16), MCL 554.139; MSA 26.1109, and MCL 125.471; MSA 5.2843, and the trial court erred in granting summary disposition to defendants regarding this claim.

V

Plaintiffs next argue that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) to defendants regarding the claim for constructive ejection. Specifically, the trial court ruled that defendants had no notice of the problem and that when they were notified, defendants investigated the possible contaminant thoroughly.

Plaintiffs' claim for constructive ejection is premised upon MCL 125.536; MSA 5.2891(16). As noted previously, the statute requires that the occupant shall have an action against the owner after giving notice to the owner and the owner fails to make the necessary corrections. With respect to the notice requirement, Mary stated at her deposition that in late May or early June of 1992, she told Austin Koss, Jr. that she suspected that her health problems may be caused by environmental contaminants in her apartment. On June 18, 1992, Mary again informed defendant that she believed that her and her son's health problems were related to their occupancy in the apartment because their conditions worsened when they lived at the apartment, but got better when they lived elsewhere. In June 1992, she learned that she and her son had unacceptable levels of arsenic in their systems. Mary then notified

defendants on June 21, 1992, that she intended to have the apartment tested for environmental toxins. Further, Austin Koss, Jr. testified at his deposition that he spoke with Mary on the telephone where she related to him her health problems and her concern about possible contaminants in the apartment building.

In June 1992, Mary and her son were found to have unacceptably high levels of arsenic in their systems following medical examinations. Mary contacted the Oakland County Health Department on June 24, 1992, and the Auburn Hills building inspector the following day. Although she had contacted defendants regarding her concerns of possible environmental contamination in the apartment, defendants only conducted a visual inspection of the apartment. Mary then contacted Dr. George Riegel of Asbestos Removal Systems, Inc. to have the apartment tested in early July of 1992. He took dust samples and forwarded them to Clayton Laboratories for testing. The results showed high levels of arsenic in the dust samples taken from the master bathroom air vent. In mid-August 1992, the Oakland County Health Department conducted its own tests, which were forwarded to the State Health Department. However, the Health Department found no arsenic, but it did not collect any dust samples from the master bathroom air duct.

We find that plaintiffs have presented sufficient evidence creating a material factual dispute regarding whether defendants had notice that the apartment was contaminated with arsenic. Although the Health Department found no levels of arsenic, it did not test the dust in the master bathroom air duct where Clayton Laboratories had found the high level of arsenic. Further, Mary Anderson did contact defendants about the possible contamination and they were aware of the result of the test done by Riegel. Accordingly, the trial court erred in granting defendants summary disposition regarding the claim of constructive ejection. Plaintiffs have presented sufficient evidence to create a material factual dispute regarding whether defendants had notice of the arsenic contamination in plaintiffs' apartment.

VI

Plaintiffs next argue that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) regarding their claim for violation of the MCPA, MCL 445.903(1)(bb), (cc); MSA 19.418(3)(1)(bb), (cc). The trial court held that while the MCPA included residential leases of real property, courts have "generally awarded contractual damages only and have not awarded damages for personal injury" for violations.

MCL 445.911; MSA 19.418(11) provides for actions by private citizens. It states in pertinent part:

> (1) Whether or not he seeks damages or has an adequate remedy at law, a person may bring an action to do either or both of the following:
>
> (a) Obtain a declaratory judgment that a method, act, or practice is unlawful under section 3.

(b) Enjoin in accordance with the principles of equity a person who is engaging or is about to engage in a method, act, or practice which is unlawful under section 3.

(2) Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover *actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees.* [Emphasis added].

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Stanaway,* 446 Mich 643, 658; 521 NW2d 557 (1994). The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd,* 441 Mich 547, 567; 495 NW2d 531 (1993). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used; technical terms are to be accorded their peculiar meanings. MCL 8.3a; MSA 2.212(1). A resort to dictionary definitions is an appropriate method of achieving this result. *In re Condemnation of Lands,* 133 Mich App 207, 211; 349 NW2d 261 (1984).

"Actual damages" is not defined within the MCPA. In *Smolen v Dahlmann Apts, Ltd,* 127 Mich App 108; 338 NW2d 892 (1983), this Court resorted to dictionary definitions for the meaning of the term "damages," stating: "The ordinary meaning of 'damage' is that of injury to something. . . . Webster's defines 'damage' as 'loss or harm resulting from injury to person, property, or reputation.'" *Id.* at 115. *Black's Law Dictionary* (6th ed, 1990), p 389, defines "damages" as "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." We find that the Legislature intended the ordinary meaning of "damages" and has therefore not limited recovery under the MCPA to contractual damages. The trial court, therefore, erred in dismissing plaintiffs' claim for damages under the MCPA pursuant to MCR 2.116(C)(8).

VII

Plaintiffs next argue that the trial court erred in granting summary disposition in favor of defendants regarding plaintiffs' claim for negligence.

In the lower court proceedings, the parties relied on the test for inferred negligence stated in *Evans v Van Kleek,* 110 Mich App 798; 314 NW2d 486 (1981). In *Evans,* the plaintiffs lost all of their personal property when their rented residence burned, and they sued their lessor, alleging a violation of MCL 554.139; MSA 26.1109. This Court affirmed the trial court's finding of liability, stating four conditions that must generally exist to infer that a defendant was negligent. The trial court found that plaintiffs had not met the *Evans* test because defendants "did not have exclusive control as per the lease" and because the explanation of the presence of arsenic was unknown to both sides.

We find that the trial court clearly erred in its analysis because defendants admitted to having "sole care, operation, supervision, control, maintenance and ownership" of the apartment's "mechanical equipment and appliances to provide heat, ventilation, air condition and water/sewer systems." Moreover, even if defendants had not admitted this fact, the trial court must accept the factual

allegations contained in plaintiffs' complaint as true in ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8). The trial court did just the opposite, accepting defendants' allegations as true. Moreover, because the air vent and fan were within the defendants' sole care and control, the trial court also erred in ruling that the true explanation for the presence of the arsenic was not more readily accessible to defendants than to plaintiffs. The trial court is not permitted to make such factual findings when ruling on a motion for summary disposition.

We reverse the trial court's grant of summary disposition to defendants on plaintiffs' claims for breach of contract, breach of statutory covenant, violation of the Michigan Consumer Protection Act, and negligence and remand for further proceedings. We do not retain jurisdiction. Plaintiffs, having prevailed in full, may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

[1] They later married, but have since divorced.

[2] Plaintiffs do not appeal the trial court's dismissal of this claim.