

STATE OF MICHIGAN
COURT OF APPEALS

CAROLYN WILSON,

Plaintiff-Appellant,

v

RIVER TOWERS LIMITED DIVIDEND
HOUSING ASSOCIATION LIMITED
PARTNERSHIP,

Defendant-Appellee.

UNPUBLISHED
December 19, 2013

No. 311592
Wayne Circuit Court
LC No. 10-012827-NO

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

In this premises liability suit, plaintiff Carolyn Wilson appeals of right the trial court's order granting defendant River Towers Limited Dividend Housing Association Limited Partnership's motion for summary disposition and dismissing her claims. Because we conclude there were no errors warranting relief, we affirm.

In August 2010, Wilson went shopping with her daughter. Wilson's daughter drove back to Wilson's apartment complex after they finished shopping; she backed her car into a parking spot abutting an embankment. Wilson got out of the car and went to the trunk to help retrieve the groceries. Wilson stepped over the curb and onto a graveled landscaping area behind the car; she then lost her footing and fell. Wilson dislocated her ankle and heel and broke her leg or foot in three places. She sued the Association for breaching its common law, contractual, and statutory duties to properly maintain its premises. The Association moved for summary disposition under MCR 2.116(C)(10) and the trial court granted its motion.

On appeal, Wilson argues that the trial court erred when it dismissed her claim premised on the Association's breach of its statutory duty to keep common areas fit for the use intended by the parties. See MCL 554.139(1)(a). She contends that the grant of summary disposition was inappropriate because there was a genuine issue of material fact regarding the primary, intended use of the rocky berm area. Specifically, she argues that there was evidence that the intended use of the parties regarding the berm was not only for landscaping and lighting, but also for walking and standing. This court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362,

369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of a statute. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

With every residential lease made in Michigan, the lessor covenants that the common areas are fit for the parties' intended use: "in every lease or license of residential premises, the lessor or licensor covenants" that "the premises and all common areas are fit for the use intended by the parties." MCL 554.139(1)(a). As our Supreme Court has explained, this statutory provision effectively imposes a contractual duty on the lessor to "keep the [common area] 'fit for the use intended by the parties.'" *Allison*, 481 Mich at 429, quoting MCL 554.139(1)(a). However, the lessor is not required to maintain the common area in "an ideal condition", but need only maintain the common area in the condition that renders it fit for its intended use. *Allison*, 481 Mich at 430. If a tenant uses the common area for a use other than "that for which the area is intended", the tenant is not protected by the statutorily imposed covenant. *Id.* at 431.

Here, Wilson argues that the trial court erred by failing to take into consideration the evidence that she believed the embankment was intended to be used as a place to stand or walk. She maintains on appeal that "the use intended by the parties" refers to any use intended by either the lessor or tenant. We do not agree that Wilson's subjective beliefs about the common area are sufficient to establish a question of fact as to whether the use "intended by the parties" was for walking or standing. Rather, by framing the statutory duty as a covenant concerning the common area's fitness for "the use intended by the parties", the Legislature indicated that the use must be the one the parties mutually understood for that common area. MCL 554.139(1)(a). Accordingly, once the Association came forward with evidence that the embankment was not designed or intended for walking or standing, Wilson had to present evidence from which a reasonable finder of fact could conclude that the parties to the lease would have mutually understood that the embankment was intended for the use as a pedestrian walkway or place for standing and unloading cars. *Barnard Mfg*, 285 Mich App at 374.

Even viewing the evidence in the light most favorable to Wilson, there was no genuine issue of material fact that the rocky berm was not intended by the parties as a place to walk or stand. The Association's property executive averred that the "ground berm area between the paved parking lot and the fence" was built to provide a "landscape perimeter" and "area for lights installation"; it was not "designed or intended for pedestrian travel." These averments were consistent with the photographic evidence. The berm did not lead to a walkway or entrance to the complex and was plainly separated from the parking lot by a raised curb. Wilson's only evidence that the berm was intended as a walkway included testimony that she and another witness had seen people walk along it and that there were no signs or obstacles specifically prohibiting such use. However, the fact that persons had used the berm for a purpose other than its obvious intended purpose and that there were no specific prohibitions against using the berm for a purpose other than its obvious intended purpose does not establish a question of fact on this issue. The berm itself was plainly rocky and unsuited for regular pedestrian travel. And, unless a driver backed so far into a parking spot that there remained no paved surface behind the car, a person would never have a need to step onto the berm to access his or her car's rear.

Given the evidence, no reasonable jury could conclude that the parties intended the berm to be used as a pedestrian way or even as a place to stand and access a parked car. Moreover, Wilson has not argued that the berm was unfit for its intended landscaping uses. Consequently, the trial court did not err when it dismissed Wilson's claim premised on a violation of the duty stated in MCL 554.139(1)(a).

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly