DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

CA06-127

November 15, 2006

RACHEL TENNELL
APPELLANT

v.

MIDTOWN APARTMENTS
LIMITED PARTNERSHIP
APPELLEE

AN APPEAL FROM SEBASTIAN COUNTY
CIRCUIT COURT
[No. CV-04-1330]

HONORABLE J. MICHAEL FITZHUGH,
CIRCUIT JUDGE

REVERSED and REMANDED

The Sebastian County Circuit Court granted summary judgment to appellee Midtown Apartments Limited Partnership (Midtown) on appellant Rachel Tennell's claim for personal injuries allegedly caused by her tripping on a steel plate on Midtown's parking lot. On appeal, Tennell contends that the trial court erred in granting summary judgment because Midtown assumed a duty to make repairs and that Arkansas should abandon the doctrine of caveat lessee. We reverse and remand the trial court's grant of summary judgment.

Tennell entered into a lease agreement for an apartment with Midtown on March 24, 1997. Midtown was subsidized and funded by the Department of Housing and Urban Development (HUD) and specifically catered to elderly and handicapped tenants. On August 13, 2002, Tennell was waiting under the breezeway for a ride from her daughter. She

saw a vehicle resembling her daughter's car and started walking across the parking lot. There was a large steel plate, approximately six to eight inches in diameter that was approximately two inches high protruding from the driveway. Tennell fell and was taken to a hospital where she was treated for her injuries.

On October 11, 2004, Tennell filed suit, alleging that she fell over the steel plate and that Midtown was negligent in maintaining the premises. One of the specific allegations of negligence was that Midtown attempted to make alterations or repairs to a post or pole but did not completely remove all of the post and that the plate covered this area. Midtown denied the material allegations of the complaint.

On August 5, 2005, Midtown filed a motion for summary judgment, arguing that a landlord is not responsible for a tenant's injuries in the common area of the apartment complex. Tennell responded, arguing that Midtown had assumed a duty to make repairs to the premises, thereby precluding summary judgment. Excerpts of deposition testimony were submitted for the trial court's consideration. On September 9, 2005, the trial court entered an order granting Midtown's motion, based on the doctrine of caveat lessee. The trial court also found that Midtown did not agree in the lease to assume any duty. Tennell now appeals.

In her first point, Tennell argues that the trial court erred in granting summary judgment to Midtown because, in the lease, Midtown assumed a duty to maintain the premises and to make repairs. Arkansas follows the common-law rule that a landlord owes no duty to his tenant to repair the premises. *Wheeler v. Phillips Dev. Corp.*, 329 Ark. 354, 947 S.W.2d 380 (1997); *Denton v. Pennington*, 82 Ark. App. 179, 119 S.W.3d 519 (2003).

However, we have recognized that a duty can arise in certain circumstances under the terms of a lease. *See Denton*, *supra*.

The question of duty owed by one person to another is ordinarily one of law. *Elkins v. Arkla, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1993). However, when the matter of duty is the subject of a contract that is ambiguous as to the parties' intent, a question of fact is presented. *Id.*; *Denton*, *supra*. Language in a contract is ambiguous when there is doubt or uncertainty as to its meaning or it is fairly susceptible of two interpretations. *Denton*, *supra*. On motion for summary judgment, the court, viewing the evidence in the light most favorable to the nonmoving party, ascertains the plain and ordinary meaning of the language in the written instrument, and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Id*.

The lease contained the following provisions:

> 1. [Midtown] leases to [Tennell], and [Tennell] leases from [Midtown] *dwelling unit* in the project known as, Mid Town Apartments, for a term . . . .
>
> . . . .
>
> 15. [Tennell] for [herself] and [her] heirs, executors and administrators agrees as follows:
>
> . . . .
>
> (b) To keep the *premises* in a safe and sanitary condition, and to comply with all obligations imposed upon TENANTS under applicable provisions of building and housing codes materially affecting health and safety with respect to said *premises* and appurtenances, and to save [Midtown] harmless from all fines, penalties and costs for violations or noncompliance by [Tennell] with any of said laws, requirements or regulations, and from all liability arising out of any such violations or noncompliance.
>
> . . . .

> 17. [Midtown] agrees to comply with the requirement of all applicable Federal, State, and local laws, including health, housing and building codes and to deliver and maintain the *premises* in safe, sanitary and decent condition.
>
> 18. [Tennell], by the execution of this Agreement, admits that the *dwelling unit* described herein has been inspected by [her] and meets with [her] approval. [Tennell] acknowledges hereby that said *premises* have been satisfactorily completed and that [Midtown] will not be required to repaint, replaster, or otherwise perform any other work, labor, or service which it has already performed for [Tennell]. [Tennell] admits that [she] has inspected the *unit* and found it to be in good and tenantable condition, and agrees that at the end of the occupancy hereunder to deliver up and surrender said *premises* to [Midtown] in as good condition as when received, reasonable wear and tear excepted.

(Emphasis added.)

The word "premises" makes the lease ambiguous because it is susceptible to more than one interpretation in that, in addition to Tennell's apartment, it may or may not encompass the common areas such as the breezeway and parking lot. During oral argument, Midtown's counsel, in a refreshing display of candor, acknowledged that "dwelling unit" and "premises" were not synonymous, which comports with the dictionary definition of "premises" as "[a] house or building, along with its grounds."[1] Although the lease seems to place similar duties on both Tennell and Midtown to maintain the "premises," it would not make sense for Tennell to be obligated to maintain the common areas because Midtown is the party in control of the common areas. A material question of fact remained; therefore, the trial court erred when it granted Midtown's motion for summary judgment.[2]

---

[1] BLACK'S LAW DICTIONARY 1219 (8th ed. 2004).

[2] In light of our disposition of this point, we need not address Tennell's argument that, by its conduct, Midtown assumed a duty.

For her second point, Tennell argues that the doctrine of caveat lessee is outdated and should be abandoned in Arkansas. The Arkansas Supreme Court was asked to overrule the doctrine in *Propst v. McNeill,* 326 Ark. 623, 932 S.W.2d 766 (1996), and in *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001). The court declined to do so, stating that the issue was best suited for determination by the legislature.

Act 928 of 2005, codified as Ark. Code Ann. § 18-16-110 (Supp. 2005), was the legislature's response to *Propst* and *Thomas*. The Act codified the common law rule that a landlord is not liable to a tenant, the tenant's licensees, or the tenant's guests for death or injury that was proximately caused by defects or disrepair on the premises. Tennell recognizes that section 18-16-110 is in effect but still asks this court to overrule the doctrine of caveat lessee. However, the legislature, rather than the courts, is empowered to declare public policy, *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997), and whether a law is good or bad, wise or unwise, is a question for the legislature, rather than the courts. *Longstreth v. Cook*, 215 Ark. 72, 220 S.W.2d 433 (1949). Further, this court is bound to follow the precedents of our supreme court. *See Gause v. Shelter Gen. Ins.*, 81 Ark. App. 133, 98 S.W.3d 854 (2003).

Reversed and remanded.

PITTMAN, C.J., and GRIFFEN, J., agree.