STATE OF MICHIGAN

COURT OF APPEALS

DENNIS McCONNELL, Personal Representative of the Estates of BRANDI McCONNELL and DENNIS McCONNELL, DENNIS CHOJNACKI, Personal Representative of the Estates of SUNNI JO CHOJNACKI and CHELSEA CHOJNACKI,

Plaintiff-Appellants,

v

MITCHELL SMITH,

Defendant-Appellee.

UNPUBLISHED
June 9, 1998

No. 200769
Alpena Circuit Court
LC No. 95-001526-NO

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this wrongful death action. We affirm.

Defendant owned a home in which his sister, Marcia Smith,[1] her four children,[2] and plaintiff Chojnacki lived for nearly two years. Defendant continued to live occasionally in the home with Marcia Smith, her four children, and plaintiff Chojnacki. On November 9, 1993, a fire burned defendant's home and killed all four children, who were at home unattended by an adult. The house contained two nonfunctioning smoke alarms at the time of the fire and the fire was apparently caused by a cigarette that had not been properly extinguished. In October 1993, both Marcia Smith and plaintiff Chojnacki were aware that the two smoke detectors in the house did not function properly. They decided to purchase two new smoke detectors when replacing batteries in the old detectors did not appear to fix the malfunction. Marcia Smith and plaintiff Chojnacki went to Kmart to purchase the smoke detectors, but those on sale were not in stock, so they received a "rain check." New smoke alarms were not purchased before the fire occurred.

Plaintiffs filed a wrongful death suit, alleging landlord negligence and assumption of duty with respect to defendant. Specifically, plaintiffs alleged that defendant owed a legal duty, as the landlord, to

maintain the premises in a reasonably safe manner, to install and maintain working smoke detectors, and that the failure of the landlord to do so proximately caused the deaths of the children. Defendant moved for summary disposition. The trial court granted defendant's motion ruling that there was no evidence that defendant had knowledge of or that plaintiffs furnished notice of the defect (the nonfunctioning smoke detectors), that defendant did not retain the requisite control over the property so that he did not owe plaintiffs a legal duty, and that plaintiff Chojnacki assumed control over the smoke detectors.[3]

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id.* The court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial. *Id.*

We affirm the trial court's ruling, but only as to the issue of notice. The general rule in this regard is that the liability of a landlord to a tenant for injuries resulting from defects existing at the time premises are leased extends only to defects which the landlord knows or should have known, and which are not open to the observation of the tenant. *Rhodes v Seidel*, 139 Mich 608, 609-610; 102 NW 1025 (1905); *Wallington v Carry*, 80 Mich App 248, 251; 263 NW2d 338 (1977). A lessor is liable to a tenant for injuries resulting from defects existing at the time premises are leased 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 tenant; and (4) the defect is not observable to the tenant. *Id.* Moreover, our Supreme Court has stated that a premises owner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

In this case, it is undisputed that defendant did not conceal or fail to disclose the existence of the nonfunctioning smoke detectors to his tenants. In fact, both Marcia Smith and plaintiff Chojnacki were aware of the nonfunctioning smoke detectors and attempted to fix them by placing new batteries in them. When replacing the batteries did not correct the problem, Marcia Smith and plaintiff Chojnacki went to purchase new smoke detectors, although none were actually purchased before the fire. Therefore, the defect was clearly observable and known to the tenants. Additionally, Marcia Smith and plaintiff Chojnacki certainly discovered the defect and attempted to protect themselves from the risk of not having working smoke detectors in the house.

Accordingly, we conclude that defendant, the premises owner, was not liable to plaintiffs, as invitees, because there is no evidence that the risk of harm remained unreasonable in spite of the knowledge of the defect by the invitees. See *Bertrand, supra*, p 611. Here, the invitees knew of the defect and attempted to correct the defect. The fact that the invitees did not successfully fix the defect and that a cigarette not properly extinguished caused the fire will not give rise to the landlord's liability, i.e., that the landlord had reason to expect that the children would nevertheless suffer harm because there were nonfunctioning smoke detectors in the house. *Id.*, pp 610-614. Rather, the invitees discovered, realized, and attempted to protect themselves from further danger involved in not having

functioning smoke detectors in the house. Thus, the defect was clearly open to the observation of the tenants. *Wallington, supra,* p 251.

The trial court did not err in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] Smith was originally a codefendant in this action, but she was dismissed from the suit upon stipulation of the parties in an order dated January 9, 1997.

[2] Plaintiff McConnell is the father of Brandi and Dennis McConnell, and plaintiff Chojnacki is the father of Sunni Jo and Chelsea Chojnacki. Brandi, the oldest child, was thirteen years old at the time of the fire.

[3] The trial court assumed for purposes of the motion that a landlord-tenant relationship existed. Contrary to defendant's argument on appeal, we agree with the trial court that a landlord-tenant relationship existed. Marcia Smith paid defendant approximately $290 a month, and attempted to pay monthly utility bills when she could afford to do so. We find that the presence of Marcia Smith and her four children in defendant's home was related to his pecuniary interest, therefore, they qualified as invitees. *Stanley v Town Square Co-op,* 203 Mich App 143, 147; 512 NW2d 51 (1993).