STATE OF MICHIGAN

COURT OF APPEALS

CONTINENTAL INSURANCE COMPANY,
Subrogee of Sigma Phi Epsilon Building Association,

Plaintiff-Appellant/Cross-Appellee,

v

SIGMA PHI EPSILON FRATERNITY and
NATIONAL HOUSING CORPORATION OF
SIGMA EPSILON FRATERNITY,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 1, 1998

No. 204090
Washtenaw Circuit Court
LC No. 96-006956 CZ

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Plaintiff Continental Insurance Company, as subrogee of Sigma Phi Epsilon Building Association, appeals as of right from an order (1) granting summary disposition in favor of defendants Sigma Phi Epsilon Fraternity and National Housing Corporation Of Sigma Phi Epsilon Fraternity, and; (2) denying defendants' motion for costs and sanctions. Defendants cross-appeal as of right the same order. We affirm.

Defendant Sigma Phi Epsilon Fraternity (defendant fraternity), a Virginia corporation, is a national college fraternity with local undergraduate chapters. Defendant National Housing Corporation Of Sigma Phi Epsilon Fraternity (defendant housing corporation), also a Virginia corporation, is a separate subsidiary of defendant fraternity whose purpose is to assist fraternity alumni boards in providing housing for local undergraduate chapters, either by loaning money directly to an alumni board for the purchase of housing or by serving as a guarantor on a note taken out by an alumni board for such purchase. Defendant fraternity then works to ensure that the local undergraduate chapters are operating at a level that will allow the local chapters to make their payments on the housing to the alumni boards, who, in turn, forward the funds that are due on their loans to defendant fraternity.

For some time, defendant fraternity's local undergraduate chapter at the University of Michigan (the local chapter) occupied a chapter house at 733 South State Street in Ann Arbor. The chapter

house was owned by Sigma Phi Epsilon Building Association (building association), a Michigan corporation whose shareholders are primarily alumni of the local chapter. A first and second mortgage was held on the chapter house by, respectively, Comerica Bank and defendant housing corporation. Defendant housing corporation was also a guarantor on the first mortgage held by Comerica Bank.

In September, 1994, defendant fraternity suspended the local chapter's charter pending the investigation of an alleged hazing incident. In October, 1994, either the local chapter decided to surrender its charter to defendant fraternity or defendant fraternity withdrew the local chapter's charter. From October, 1994, to May, 1995, the building association leased rooms in the chapter house to former members of the local chapter. When the building association thereafter refused to enter into any new leases, the chapter house became vacant in June, 1995. In August, 1995, defendant housing corporation apparently instituted foreclosure proceedings on the chapter house as a result of the failure of the building association to make its mortgage payments. In September, 1995, the vacant chapter house was destroyed by a fire believed to have been deliberately started by trespassers.

Plaintiff Continental Insurance Company had issued a policy on the chapter house for the period March 3, 1995, to March 3, 1996. The policy listed the building association as the named insured and Comerica Bank and defendant housing corporation as mortgage holders. Following the fire, plaintiff paid off the loss with an approximately $770,000 check written jointly to the building association and the two mortgage lienholders, Comerica Bank and defendant housing corporation. Apparently in February, 1996, the building association transferred the deed to the chapter house to defendant housing corporation in lieu of foreclosure. Defendant housing corporation apparently then sold the property to the University of Michigan.

Plaintiff, as subrogee of the building association, thereafter filed the instant action against defendants, alleging claims of nuisance, negligence, and gross negligence. Plaintiff's various nuisance claims were essentially based on the theory that the chapter house had become a nuisance and that defendants, who were in a position to exercise control over the chapter house, had failed to abate this nuisance. Plaintiff's various negligence claims were essentially premised on the theory that defendants had breached their duty to plaintiff to exercise reasonable care to maintain the chapter house in a safe condition.

Defendants subsequently moved both for summary disposition and for costs and sanctions for filing a frivolous claim.

The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). The court found that no question of fact existed that defendant fraternity and defendant housing corporation were separate corporations. With respect to defendant fraternity, the trial court found (1) that no nuisance claim could be maintained by plaintiff because defendant fraternity did not have control or possession of the chapter house, and; (2) that no negligence claim could be maintained by plaintiff because defendant fraternity had no duty with respect to the chapter house. With respect to defendant housing corporation, the trial court found on grounds unrelated to this appeal that plaintiff likewise could not maintain a claim against this defendant. The trial court denied defendants' motion for costs and sanctions.

As explained in *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998) (citations omitted):

> When reviewing a motion for summary disposition based on MCR 2.116(C)(10), our task is to determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law. . . . As such, we review the lower court's decision de novo. . . . We must "consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party."

In this case, plaintiff raises no argument with respect to defendant housing corporation.[1] Rather, plaintiff argues that the trial court erred in granting summary disposition in favor of defendant fraternity on plaintiff's claims sounding in negligence. Specifically, plaintiff raises alternative grounds for its contention that the trial court erred in ruling that defendant fraternity had no duty to make the chapter house safe.

Subrogation is the substitution of one person in the place of another with respect to a lawful claim. *Allstate Ins Co v Snarski*, 174 Mich App 148, 154; 435 NW2d 408 (1988). A subrogee acquires no greater rights than those possessed by the subrogor. *Id*. A claim for negligence requires, in relevant part, that the plaintiff demonstrate that the defendant owed a duty to the plaintiff. *Smith v Stolberg*, ___ Mich App ___; ___ NW2d ___ (Docket No. 202848, issued 8/18/98), slip op p 2. Thus, in order to assert a negligence claim in this case, plaintiff, as subrogee of the building association, must initially demonstrate that defendant fraternity owed the building association a duty to make the chapter house owned by the building association safe.

Duty is an obligation to conform to a specific standard of care toward another as recognized under the law. *Smith, supra*. In general, in determining whether a duty should be imposed, a court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 359; ___ NW2d ___ (1998). The issue of duty is generally question of law for the court to decide. *Id*. On appeal, we review de novo the question of duty. *Reeves v K-Mart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998).

In this case, plaintiff first focuses solely on the factor of the relationship between the building association and defendant fraternity. Specifically, plaintiff contends that when this relationship is examined it is clear that defendant fraternity so controlled the chapter house that a duty arose on the part of defendant fraternity to make the chapter house safe. In arguing that defendant fraternity controlled the chapter house, plaintiff relies on excerpts of defendant fraternity's bylaws and a written transfer of assets agreement between defendant fraternity and the building association. In the agreement, the building association agreed that it would "convey . . . all of its property, real or personal," to defendant fraternity upon dissolution of the local chapter. In addition, the agreement grants defendant fraternity the right to approve or disapprove the building association's sale of the chapter house.

However, the excerpts of defendant fraternity's bylaws relied on by plaintiff do not concern the chapter house. Rather, these bylaws reveal the extent of the authority and control defendant fraternity has over the fraternal organization, including the structure and finances of the local undergraduate chapters and the conduct of the undergraduate chapter members. In addition, although the building association agreed in the transfer of assets agreement "to convey" its real property to defendant fraternity upon the dissolution of the local chapter, there is no indication in the record that such conveyance ever occurred during the relevant times at issue in this case. Finally, the agreement granted defendant fraternity simply a contractual right to approve any sale of the chapter house, but did not impose any duty to maintain the chapter house.

Thus, in examining the factor of the relationship between defendant fraternity and building association, we conclude that plaintiff has failed to demonstrate that this relationship was such that a duty should be imposed on defendant fraternity to make safe real property owned by the building association. Moreover, although not addressed by plaintiff, we note that, even assuming that the factors of the foreseeability of the harm and the nature of the risk presented are equal between these two entities, placing the burden of making the property safe on defendant fraternity, a Virginia corporation, would certainly impose a greater hardship than placing this burden on the building association, the owner of the property and a Michigan corporation. Accordingly, we conclude as a matter of law that the trial court did not err in determining that defendant fraternity did not owe the building association a duty to make the chapter house safe.

Alternatively, plaintiff notes that although the existence of a duty is generally a question of law for the court,

> where certain factual circumstances give rise to a duty, and there are disputed facts, a jury must determine whether those factual circumstances exist. . . . "[T]he jury decides the question of duty only in the sense that it determines whether the proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law. [*Braun v York Properties, Inc*, 230 Mich App 138, 141-142; 583 NW2d 503 (1998) (citations omitted).]

Plaintiff also notes that under principles of premises liability law

> [p]ossession and control are incidents of title ownership, but these possessory rights can be "loaned" to another, thereby conferring the duty to make the premises safe while simultaneously absolving the owner of responsibility. . . . By transferring the possessory rights of the property to another, the owner delegates the duty to render the premises safe while absolving himself of liability. [*Wheeler v Iron Co Rd Comm'n*, 173 Mich App 542, 544; 434 NW2d 188 (1988).]

Plaintiff contends that questions of fact existed in this case concerning defendant fraternity's possession and control of the chapter house. Plaintiff contends that summary disposition was thus inappropriate because it was for the jury to decide whether the factual circumstances of possession and control existed, in which case defendant fraternity would owe a duty to the building association to make

the chapter house safe. As evidence of defendant fraternity's possession and control, plaintiff again relies on the evidence of defendant fraternity's control over the local chapter, as evidenced by its bylaws and conduct in this case, and the transfer of assets agreement.

However, for purposes of premises liability, legal possession requires that the defendant occupy the premises with the intent to control the premises. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980); *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). In this case, there is no indication that the building association conveyed the chapter house to defendant fraternity during the relevant time periods involved in this case. Moreover, although the agreement granted defendant fraternity the right to approve any sale of the chapter house, the agreement did not speak to any right of defendant fraternity to occupy the chapter house. Thus, even granting the benefit of any reasonable doubt to plaintiff, the transfer of assets agreement raises no question of fact that defendant fraternity occupied, and therefore legally possessed, the chapter house.

It is true that the members and, subsequently, the former members of the local chapter occupied the chapter house until approximately May or June, 1995. It is also true that defendant fraternity exercised control over the local chapter and its members. However, plaintiff admits in its reply brief that the nature of the relationship between defendant fraternity and the local chapter was a "master-servant type relationship." Moreover, plaintiff's evidence of defendant fraternity's control relates to defendant fraternity's control over the organization and finances of the local chapter and its members, not defendant fraternity's control over the chapter house as real property. Thus, even granting the benefit of any reasonable doubt to plaintiff, we conclude that the fact that defendant fraternity's "servant" (the local chapter) occupied the chapter house raises no question of fact that the "master" (defendant fraternity), itself a separate legal entity, ever occupied, and therefore legally possessed, the chapter house with the intent to control the chapter house.

Because no question of fact exists concerning whether defendant fraternity ever occupied the chapter house with the intent to control it, the issue whether defendant fraternity possessed and controlled the chapter house need not be submitted to a jury.[2] Because defendant fraternity owed the building association no duty to make the chapter house safe, we therefore affirm the trial court's grant of summary disposition in favor of defendant fraternity with respect to plaintiff's claims sounding in negligence.[3]

In their cross-appeal, defendants argue that the trial court erred in denying their motion for costs and sanctions pursuant to MCL 600.2591; MSA 27A.2591 and MCR 2.114. A trial court's finding concerning whether a claim is frivolous is reviewed for clear error. *Feick v Monroe Co*, 229 Mich App 335, 345; 582 NW2d 207 (1998). In this case, the relationships between the various entities involved in this case were not immediately clear and could not be definitively determined without discovery. We thus find no clear error in the trial court's denial of
defendants' motion for costs and sanctions.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

[1] At oral argument, plaintiff specifically confirmed that it is no longer pursuing defendant housing corporation.

[2] We likewise need not consider whether premises liability law, in which a duty to make premises safe is owed by a possessor to third persons coming onto the premises (invitees, licensees and trespassers), is the appropriate model for imposing a duty on defendant fraternity to the owner of the premises.

[3] Although not specifically raised by plaintiff, we likewise affirm the trial court's grant of summary disposition in favor of defendant fraternity with respect to plaintiff's nuisance claims. See *Stevens v Drekich*, 178 Mich App 273, 278; 443 NW2d 401 (1989) (liability for nuisance requires that the defendant have possession or control of the land).