STATE OF MICHIGAN

COURT OF APPEALS

BELINDA SPEARS,

Plaintiff-Appellant,

v

LINDA SAUNDERS,

Defendant,

and

A. M. MERESS and ERNEST GILBERT,

Defendants-Appellees.

UNPUBLISHED
March 3, 1998

No. 198330
Wayne Circuit Court
LC No. 95-518869-NO

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises from plaintiff's slip and fall on the front steps of the premises leased by defendant Saunders from defendants Gilbert and Meress at the time of plaintiff's fall. The lower court entered a default judgment against Saunders for failing to appear or otherwise respond to plaintiff's complaint. Saunders was apparently responsible for the day-to-day maintenance and upkeep of the premises, including maintenance of the front steps, whereas Gilbert and Meress were responsible for any repairs.

This Court reviews de novo the lower court's order granting defendants summary disposition. *Weisman v U S Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* MCR 2.116(C)(10) permits summary disposition when, except as to damages, there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 566-

567. Giving the benefit of doubt to the nonmovant, this Court must independently determine whether the movant would have been entitled to judgment as a matter of law. *Id.* at 567.

First, plaintiff argues that a genuine issue of material fact exists as to whether defendants had possession or control over the premises at the time of plaintiff's fall. We disagree. "Under the principles of premises liability, the right to recover for a condition or defect of land requires that the defendant have legal possession and control of the premises." *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). However, ownership alone is not dispositive; instead, possession and control are rights that can be loaned to another, thereby conferring the duty to make the premises safe while simultaneously absolving the owner of responsibility. *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980). Here, aside from evidence of defendants' ownership of the premises and their activities renovating the house and collecting rent, plaintiff presented no evidence to contradict defendants' evidence that Saunders was responsible for the day-to-day upkeep of the house, including removal of snow and ice from the front steps. Therefore, the evidence indicating that Saunders was in possession and control of the premises at the time of plaintiff's fall was not controverted, so that summary disposition as to this issue was proper.

Next, plaintiff argues that a genuine issue of material fact exists as to whether the presence of indoor-outdoor carpet on the front steps created an unreasonable risk of harm. Specifically, plaintiff argues that defendants were negligent either in failing to remove the carpet or in failing to install a slip-resistant surface. Plaintiff first raised the carpet issue by attaching the report of a human factors expert to her brief in opposition to defendants' motion for summary disposition. In the report, the expert concluded that the presence of the carpet increased the danger of slipping. To further bolster this theory of recovery, plaintiff relied on her deposition testimony that she slipped on the front steps because there was ice on the carpet.

At the hearing on defendants' motion, defendants argued that the lower court should not consider the expert's report because plaintiff did not inform defendants about this witness or his testimony. Additionally, defendants argued that the report was nonetheless irrelevant because defendants had relinquished possession and control of the premises. Without addressing plaintiff's theory that the carpet was the proximate cause of plaintiff's accident, the lower court granted defendants summary disposition because defendants did not have possession or control of the premises at the time plaintiff slipped and fell.

The lower court properly disregarded plaintiff's argument about the indoor-outdoor carpet because the argument presented a basis for defendants' liability that was not a part of plaintiff's complaint. Plaintiff's complaint alleges several negligent acts or omissions that were the cause of her injuries, none of which mention the indoor-outdoor carpet allegation now at issue, but instead delineate such allegations as the failure to inspect, the failure to maintain, and the failure to warn of the condition of the premises. Alleging that defendants negligently maintained the carpeted steps is a charge that is different from alleging that defendants failed to remove the carpet or failed to install a slip-resistant surface. Therefore, we hold that the lower court properly granted defendants summary disposition because in the absence of the new theory proffered by plaintiff at the summary disposition level, defendants were entitled to judgment as a matter of law.[1]

Last, plaintiff argues that a genuine issue of material fact exists as to whether any danger created by the carpet on the steps was a latent danger that required defendants to warn of its existence. We disagree. Either with or without carpet, the front steps presented the same danger to plaintiff, i.e., slipping on the ice. Inasmuch as plaintiff testified in her deposition that she was aware of the ice on the steps, knew that the steps were slippery, and carefully proceeded up and down the steps, there is no genuine issue of material fact that the danger of falling on the ice on the steps was open and obvious to plaintiff. Therefore, defendants owed no duty to warn plaintiff of this danger, and the lower court properly granted defendants summary disposition on this issue. See *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96-97; 485 NW2d 676 (1992).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs

[1] We recognize that if a court grants a motion for summary disposition pursuant to MCR 2.116(C)(10), then the court must give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5); MCR 7.215(A)(1). See *Weymers v Khera*, 454 Mich 639, 654-666; 563 NW2d 647 (1997). However, we are not required to address whether such an amendment would be proper in this case because the parties did not move to amend their pleadings and have not raised the issue for our review.