MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashley R. Phifer,
Appellant-Plaintiff,

v.

Hestia Real Estate LLC, Sherbon LLC, and John Sherby,
Appellees-Defendants.

September 27, 2022

Court of Appeals Case No. 22A-CT-683

Appeal from the Marion Superior Court

The Honorable Timothy W. Oakes, Judge

Trial Court Cause No. 49D02-1903-CT-10670

Mathias, Judge.

[1] Ashley R. Phifer, on her own behalf and as guardian of her children, filed a complaint against Hestia Real Estate, LLC, Sherbon LLC, and John Sherby

(collectively "the Appellees") alleging that they negligently attempted to remediate mold in her apartment. Phifer claims her children suffer chronic respiratory issues due to the mold exposure. The Appellees filed a motion for summary judgment, which the trial court granted. Phifer appeals, arguing that the trial court abused its discretion when it granted the Appellees' motion to strike two exhibits. She also argues that the trial court erred when it granted summary judgment for the Appellees because there are genuine issues of material fact.

[2] We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Facts and Procedural History

[3] On September 30, 2016, Phifer entered into a twenty-four-month lease agreement with Sherbon LLC for a residence located at 4308 Vinewood Drive in Indianapolis. John Sherby was a member and manager of Sherbon LLC. Phifer moved into the residence with her two children in October. Sherbon LLC transferred ownership of the leased property to Hestia Real Estate LLC in December, but Sherbon continued to act as the landlord of the residence.

[4] Shortly after moving into the residence, Phifer realized that the toilet was leaking. Sherbon LLC's contractors attempted to fix the toilet and replaced it at least twice but it continued to leak. In April 2017, Phifer observed what appeared to be mold on the baseboards in the bathroom behind the leaking

toilet. Phifer called the Marion County Public Health Department ("MCPHD") and Sherby to report the presence of mold in the residence.

[5] Sherby sent a contractor to the residence to test the apparent mold. Sherby maintains that the test was negative for mold. Jason Krummen, an MCPHD employee, inspected the residence on May 5, 2017. Krummen observed mold growing behind the toilet and under the baseboards. He did not test the substance but concluded that it was mold based on its appearance and moisture readings in the bathroom.

[6] The Appellees were ordered to remediate the mold within thirty days. On June 9, 2017, Krummen returned to the residence. Krummen observed that the Appellees had replaced a wall in the bathroom with greenboard, which is designed to prevent mold growth. Krummen did not see any visible mold during his reinspection but noted that the toilet was still leaking, which was the likely cause of the original mold growth. Therefore, he issued an extension letter to the Appellees to fix the toilet.

[7] Krummen returned on July 7, 2017. He instructed the Appellees' maintenance worker to open the wall. Krummen observed continued mold growth in the wall and inside a bathroom vanity. During a fourth visit to the residence on July 24, 2017, Krummen saw new mold growth on the baseboards and the wall that had been replaced. Krummen returned to the residence on September 8, 2017, and the moisture readings in the bathroom were high; therefore, he assumed mold would continue to grow as it had previously. MCPHD

performed a final inspection on October 24, 2017. MCPHD did not observe any mold during the final inspection.

[8] Shortly after Phifer moved into the residence in October 2016, her children began to suffer from chronic coughing. After the mold was discovered, Phifer suspected that the mold was the cause of her children's symptoms. The children's treating physicians agreed. Both children underwent allergy testing. One of the two children tested allergic for two types of mold, Penicillium and Cladosporium. Both children tested positive for dogs, tree pollens, and ragweed. The Appellees allowed Phifer to terminate her lease, and she and her children moved out of the residence in August 2017.

[9] On March 15, 2019, Phifer, on her own behalf and as guardian for her minor children, filed a complaint against the Appellees in Marion Superior Court and alleged that the Appellees had negligently failed to maintain the residence in a reasonably safe condition. The Appellees denied the allegations and filed a motion for summary judgment on November 9, 2021. Phifer submitted several exhibits with her response to the Appellees' motion for summary judgment. The Appellees moved to strike two exhibits. They argued that Exhibit E containing documents from MCPHD should be stricken because the documents were unauthenticated and unverified. They also argued that Exhibit G, containing pediatrician Dr. Megan Gruesser's report, should be stricken because it was not timely filed. The trial court granted the motion to strike.

[10] On March 1, 2022, the trial court granted the Appellees' motion for summary judgment.[1] Phifer now appeals.

Motion to Strike

[11] Phifer argues that the trial court abused its discretion when it granted the Appellees' motion to strike two of her exhibits. The trial court has broad discretion in ruling on motions to strike in the summary judgment context. *Hamilton v. Hamilton*, 132 N.E.3d 428, 431-32 (Ind. Ct. App. 2019). The court's decision will not be reversed unless prejudicial error is clearly demonstrated. *Id.*

[12] The trial court struck Phifer's Exhibit E because it contained uncertified and unverified records from MCPHD and the Marion County Assessor's Office. In ruling on a motion for summary judgment, the trial court only considers properly designated evidence which would be admissible at trial. *D.H. by A.M.J. v. Whipple*, 103 N.E.3d 1119, 1126 (Ind. Ct. App. 2018), *trans. denied*. Admissible evidence does not include unsworn statements and unverified

[1] In their motion for summary judgment, the Appellees argued that, if Phifer was entitled to recover damages, those damages should be limited by the terms of the lease agreement, which provides in pertinent part that the tenant waives "any and all claims for losses and damages against Landlord . . . to the extent that such claims shall exceed the amount of rent described hereinabove for the period commencing on the date of alleged Landlord default and ending upon the date Tenant shall have vacated the Premises." Appellant's App. Vol. 2 p. 57. In her Appellant's brief, Phifer does not challenge the waiver provision or the trial court's grant of summary judgment on this issue but addressed the issue in her reply brief. "The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived." *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005); *see also*, Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."). Therefore, her argument is waived.

exhibits. *Zelman v. Capital One Bank N.A.*, 133 N.E.3d 244, 248 (Ind. Ct. App. 2019).

[13] The Assessor's Office and the MCPHD records were not certified. They were also not authenticated pursuant to Indiana Evidence Rule 901(a), which provides,"[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Thus, the documents would not have been admissible at trial.

[14] In response, Phifer argues that the Assessor's records would be admissible because the Appellees produced the records to her during discovery. But that an opposing party produces records in discovery does not negate the requirement that the records a party designates to the trial court on summary judgment must be authenticated.

[15] For the first time in her reply brief, Phifer claims that the MCPHD records, which include court records of MCPHD's lawsuit against the Appellees for failing to correct the violations at the property at issue are admissible via the doctrine of judicial notice. Appellant's Reply Bt. at 16-17. However, Phifer did

not request the trial court take judicial notice of these records in the trial court, and, thus, we decline do so in the first instance on appeal.[2]

[16] The trial court struck Phifer's Exhibit G because it was not timely filed in accordance with Trial Rule 56(C), which provides that a party opposing a motion for summary judgment has thirty days to serve a response or any other opposing affidavits. "When a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period." *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008) (quoting *Borsuk v. Town of St. John*, 820 N.E.2d 118, 124 n.5 (Ind. 2005)).

[17] Phifer attempted to designate Exhibit G several days after the thirty-day time limit had passed. Phifer seeks to circumvent this bright line rule and argues that Exhibit G should not have been stricken because her response to the Appellees' motion for summary judgment was timely filed. Phifer's argument is analogous to a claim that a party should be allowed to file an untimely response where the party previously filed a timely motion for extension of time. But Trial Rule 56 "does not vest a trial court with the discretion to allow a party to file an

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[2] "Indiana Evidence Rule 201(f) provides that '[j]udicial notice may be taken at any stage of the proceeding,' which includes appeals." *Banks v. Banks*, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012). But "judicial notice may not be used on appeal to fill evidentiary gaps in the trial record." *Id*. (citing *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 188 (Ind.Ct.App.1998), *trans. denied*).

untimely response simply because he or she had previously filed a timely motion for extension of time." *Welton v. Midland Funding, LLC*, 17 N.E.3d 353, 356 (Ind. Ct. App. 2014). Moreover, Rule 56(C) plainly states that "[a]n adverse party shall have thirty (30) days after service of the motion to serve a response and *any* opposing affidavits." (Emphasis added.) Because Phifer failed to file Exhibit G or seek an extension of time to file the exhibit, within the 30-day time limit, the trial court properly struck the exhibit from consideration when ruling on the Appellees' motion for summary judgment.[3]

Negligence

[18] Phifer appeals the trial court's grant of summary judgment to the Appellees. Our standard of review in summary judgment appeals is well established. As our Supreme Court has made clear, "[w]e review summary judgment de novo, applying the same standard as the trial court." *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant." *Siner v. Kindred Hosp.*

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[3] In her reply brief, Phifer claims that she was permitted to file Exhibit G, Dr. Gruesser's report, pursuant to Trial Rule 56(E) "as a supplementation of Dr. Gruesser's treatment record opinions filed in" Exhibit F. That exhibit contains two letters from Dr. Gruesser briefly describing the children's history of chronic cough, her suspicion that the cough was caused by the mold in the home, and stating her opinion that Phifer should be permitted to break the lease for the sake of her children's health. Appellant's App. Vol. IV, pp. 63-64. Rule 56(E) allows "affidavits" to be "supplemented or opposed." Exhibit F, which Phifer sought to supplement, did not contain an affidavit from Dr. Gruesser. Moreover, in her brief, Phifer does not present any argument supporting her claim that the trial court should have allowed her filing pursuant to Trial Rule 56(E) or that the trial court abused its discretion by failing to allow the filing under that rule. *See* Appellant's Br. at 30; Appellant's Reply Br. at 17. Therefore, her claim is waived. *See* Ind. Appellate Rule 46(A)(8)(a).

Phifer also relies on Marion County Local Rule 203, which generally addresses the time allowed for responding to motions. But Phifer has not presented any argument establishing reversible error under that Rule.

Ltd. P'ship, 51 N.E.3d 1184, 1187 (Ind. 2016). We draw all reasonable inferences in favor of the nonmoving party and affirm summary judgment only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting Ind. Trial Rule 56(C)). And we "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Id.* (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)); *see also Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (explaining that "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims."). Further, we may affirm the entry of summary judgment on any theory supported by the record. *See, e.g.*, *Markey v. Estate of Markey*, 38 N.E.3d 1003, 1006-07 (Ind. 2015).

[19] To prevail on the negligence claim, Phifer must establish: (1) the Appellees owed a duty to Phifer and her children; (2) the Appellees breached that duty by allowing their conduct to fall below the applicable standard of care; and (3) the Appellees' breach of duty proximately caused a compensable injury to Phifer. *See Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Phifer argues that the Appellees breached their duty to provide a safe and

habitable residence by allowing her children to be exposed to mold which caused them to suffer from respiratory issues.[4]

[20] Historically, the common law did not impose a duty upon a landlord to protect tenants from injuries due to defective conditions on the property once possession and control of the property had been surrendered. *Zubrenic v. Dunes Valley Mobile Home Park, Inc.*, 797 N.E.2d 802, 806 (Ind. Ct. App. 2003), *trans. denied*; *see also Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind. Ct. App. 1993). This policy was known as "caveat lessee" or "let the lessee beware." *Dickison*, 611 N.E.2d at 694. Thus, a tenant who had the opportunity to inspect the property before accepting it was considered to have accepted the property in its existing condition. *Id.*

[21] However, a landlord may be held liable for personal injuries caused by latent defects known to the landlord but unknown to the tenant and which the landlord fails to disclose. *Dickison*, 611 N.E.2d at 695. Actual knowledge of the hidden defect on the landlord's part must exist before a duty to warn of the defect arises. *Id.* A landlord can also be liable to a tenant when he or she agrees to repair the premises and either fails to do so or negligently repairs the premises. *Dickison*, 611 N.E.2d at 694. Finally, a landlord may "be liable to a tenant because of negligence that arises from the violation of a duty imposed by

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[4] The Appellees dispute that the substance was mold. But in his deposition, the MCPHD inspector, who had training to identify mold, testified that he saw mold growing along the baseboards, in the wall, and in a bathroom vanity at the residence. To the extent the Appellees dispute that the substance is mold, that is an existing issue of material fact to be resolved by the judge or jury at trial.

statute or ordinance." *Erwin v. Roe*, 928 N.E.2d 609, 616 (Ind. Ct. App. 2010) (citing *Hodge v. Nor–Cen, Inc.*, 527 N.E.2d 1157, 1159 (Ind. Ct. App. 1988), *reh'g denied, trans. denied*). A landlord's violation of statutory duty is only actionable where the negligence is also the proximate cause of the injury. *Id.*

[22] Landlords are statutorily required to

> (1) Deliver the rental premises to a tenant in compliance with the rental agreement, and in a safe, clean, and habitable condition.
>
> (2) Comply with all health and housing codes applicable to the rental premises.
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> (3) Make all reasonable efforts to keep common areas of a rental premises in a clean and proper condition.
>
> (4) Provide and maintain the following items in a rental premises in good and safe working condition, if provided on the premises at the time the rental agreement is entered into:
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> > (A) Electrical systems.
> >
> > (B) Plumbing systems sufficient to accommodate a reasonable supply of hot and cold running water at all times.
> >
> > (C) Sanitary systems.
> >
> > (D) Heating, ventilating, and air conditioning systems. A heating system must be sufficient to adequately supply heat at all times.
> >
> > (E) Elevators, if provided.
> >
> > (F) Appliances supplied as an inducement to the rental agreement.

Ind. Code § 32-31-8-5.

[23] In this case, there is nothing in the designated evidence that would establish that the Appellees had actual knowledge that there was mold in the home when Phifer moved into the leased premises.[5] Phifer designated evidence to establish that the Appellees knew that the toilet was leaking, but the designated evidence also established that the Appellees attempted to remedy the defect. The Appellees attempted to fix the toilet, replaced the toilet twice, and resealed the toilet two or three times.

[24] Phifer did not suspect that mold was causing her sons' chronic coughing until she observed mold under the baseboard behind the toilet in April 2017. And the Appellees did not have actual notice of the mold in the bathroom until Phifer notified them on the day she also discovered the mold for the first time.

[25] The Appellees took steps to remediate the mold, including replacing the bathroom wall with green board, which is used to prevent mold growth. The Appellees designated evidence that MCPHD did not observe any visible mold during the June 2017 inspection, but the toilet was still leaking. MCPHD requires leaks to be resolved to fully remediate mold. During the July 7, 2017 inspection, MCPHD observed visible mold growth behind the bathroom wall and inside the bathroom vanity. On July 24, the MCPHD inspector saw mold growth reappearing on the baseboard in the bathroom. In August 2017, Phifer was allowed to terminate the lease, and she moved her family from the

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[5] The children began to exhibit respiratory symptoms approximately one month after the family moved into the house.

property. The MCPHD inspector returned to the residence in September and concluded that mold was likely still growing because of the high moisture readings in the bathroom.

[26] It is undisputed that Appellees made attempts to repair the leaking toilet and to remediate the mold. But the question remains whether the Appellees were negligent in their attempts to do so, particularly after they learned that the leaking toilet was causing mold growth in the bathroom. A trier of fact must also resolve whether the Appellees violated their statutory obligations under Indiana Code section 32-31-8-5 by failing to repair the leaking toilet which caused continued mold growth.[6]

[27] Because genuine issues of material fact remain, we conclude that the trial court erred when it granted the Appellees' motion for summary judgment.

Sherby Is Not Personally Liable

[28] Finally, the parties dispute whether Sherby can be held personally liable in this case. The properly designated evidence established that Sherbon LLC owned the residence on the date Phifer executed the lease agreement. *See* Appellees' App. Vol. 2 pp. 26-27. Sherbon LLC is also listed as the landlord in the lease agreement. Appellant's App. Vol. 2 p. 52. Two months after the lease was executed, property ownership of the residence was transferred to Hestia Real

[6] Whether the mold caused the children's chronic coughing is unquestionably a remaining issue of genuine material fact as Phifer and the Appellees designated opinions by medical professionals to support their arguments concerning the cause of the children's respiratory issues.

Estate LLC but Sherbon LLC continued to act as the property manager and landlord of the residence. Sherby was the managing member of Sherbon LLC. Appellant's App. Vol. 2 p. 49.

[29] The Indiana Business Flexibility Act provides:

> A member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company. A member, a manager, an agent, or an employee of a limited liability company may be personally liable for the person's own acts or omissions.

Ind. Code § 23–18–3–3(a). "[I]ndividuals associated with a limited liability company are not personally liable merely because of their ownership in the entity, while at the same time, association with a limited liability company does not preclude liability for one's own actions or omissions." *Troutwine Estates Development Co., LLC v. Comsub Design and Eng'g, Inc.*, 854 N.E.2d 890, 898-99 (Ind. Ct. App. 2006).

[30] Phifer has not designated any evidence that would support an inference that Sherby was acting on his own behalf. The evidence establishes that his involvement in leasing the residence and managing the property was solely as the managing member of Sherbon LLC. Therefore, Sherby cannot be held personally liable if Phifer prevails at trial, and we affirm the entry of summary judgment as to Sherby.

Conclusion

[31] The trial court properly struck Phifer's exhibits E and G and properly entered summary judgment as to Sherby in his personal capacity. However, the trial court erred when it concluded that the remaining Appellees are entitled to summary judgment. The landlord Appellees owed a duty to tenant Phifer and her children, and whether they breached that duty is a genuine issue of material fact that precludes the entry of summary judgment. Thus, we affirm the trial court's exclusion of the evidence and entry of summary judgment for Sherby, but we reverse the trial court's entry of summary judgment for the landlord Appellees, and we remand for further proceedings.

[32] Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Brown, J., and Pyle, J., concur.