STATE OF MICHIGAN

COURT OF APPEALS

SHARON KROLICKI,

Plaintiff-Appellant,

v

R.P. CONSTRUCTION COMPANY, RALPH PATTI, PAP PROPERTIES, DANNY PATRONA, LAWRENCE ARNONE and JAMES PATRONA,

Defendant-Appellees,

and

AUDIO SENTRY CORPORATION and CLINTON TOWNSHIP,

Not participating.

UNPUBLISHED
February 4, 1997

No. 176370
Macomb Circuit Court
LC No. 92004835 NO

Before: Marilyn Kelly, P.J., and Wahls, and M.R. Knoblock,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a grant of summary disposition to defendants pursuant to MCR 2.116(C)(8). We affirm in part and reverse in part.

I

On December 18, 1990, plaintiff purchased a condominium unit in the Fancesca Court Condominiums in Clinton Township. The Francesca condominiums were developed by R.P. Construction Company (R.P. Construction) and Ralph Patti. Directly adjacent to the condominiums is commercial property owned by defendants Danny Patrona, Lawrence Arnone and James Patrona (P.A.P.).

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* Circuit judge, sitting on the Court of Appeals by assignment.

On September 25, 1991, while standing in her bedroom, plaintiff heard her front door open and close. She walked to the doorway and saw a man with a stocking on his face. The intruder sexually assaulted and robbed her. He told plaintiff that he had been watching her for six weeks while hiding in the weeds on P.A.P.'s property.

On October 9, 1992, plaintiff filed suit against defendants seeking damages for injuries suffered in the assault. She alleged negligence, fraud, misrepresentation and breach of implied warranty of habitability against defendants R.P. Construction and Patti. She also alleged that the condition of the adjacent land was a cause of the attack. The trial judge granted summary disposition to defendants finding that they owed no duty to plaintiff.

II

First, the parties dispute the effect of our Supreme Court's decision in *Williams v. Cunningham Drug Stores, Inc*,[1] as regards the duty of defendants R.P. Construction and Patti. The trial court relied on *Williams* in dismissing plaintiff's complaint. We find that *Williams* did not change the basic duty a landlord owes to its invitees. Specifically, the *Williams* Court did not abrogate the landlord's duty to use reasonable care to protect tenants and their guests from foreseeable criminal activities in common areas inside the structures they control. The Court was careful to distinguish landlord-tenant situations from the fact situation before it. See *Stanley v Town Square Cooperative*, 203 Mich App 143, 149; 512 NW2d 51 (1993).

III

Next, plaintiff argues that the judge erred in granting summary disposition to R.P. Construction and Patti. She asserts that they are liable for failing to provide adequate lighting and maintenance. The parties argue that we must determine whether prior judicial decisions discussing the duty owed in the landlord-tenant context are applicable in this case.

A landlord must exercise reasonable care to protect invitees from known or discoverable unreasonably dangerous conditions on the land that the invitees will not discover or from which they reasonably will fail to protect themselves. A landlord also has the duty to protect tenants from foreseeable criminal activities of third parties in the common areas of the landlord's premises. *Stanley, supra*. Thus, landlords have a duty to take reasonable precautions, such as installing locks on doors and providing adequate vestibule lighting, and may be liable in tort if they fail to do so. *Id*. at 150; See, also, *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972); *Bryant v Brannen*, 180 Mich App 87, 97-98, 446 NW2d 847 (1989).

In *Stanley*, this Court reasoned that a cooperative association, like a landlord, exercises exclusive control over the common areas of its premises. It alone is in a position to take the necessary precautions to ensure that the common areas are safe for those who use them. *Stanley, supra* at 146. Similarly, plaintiff argues, a condominium association has exclusive control over the common areas of the complex. Therefore, plaintiff asserts that defendants in this case should owe plaintiff a duty to

protect her from unreasonable risks resulting from foreseeable activities occurring within the common area of their premises, including risks from foreseeable criminal activities.

However, under the facts of this case, we need not decide whether defendants should be treated the same as landlords. In *Williams*, the Supreme Court stated that the scope and extent of the duty to protect against third parties is essentially a question of public policy which is premised on a defendant having the control which makes him best able to provide safety. *Williams, supra* at 499. Here, the criminal attack did not occur in the common area of the condominium complex, but in plaintiff's condominium. It was plaintiff, not defendants, who had control of the security measures in her condominium. Therefore, the trial judge properly dismissed plaintiff's negligence claims, because defendants R.P. Construction and Patti owed her no duty.

IV

The trial court failed to address plaintiff's count of fraud and misrepresentation. Defendants R.P. Construction and Patti had argued that those counts too should have been dismissed pursuant to MCR 2.116(C)(8) for plaintiff's failure to state a claim upon which relief can be granted. In their brief supporting their motion for summary disposition, they relied on the case of *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993). There, the Supreme Court held that a defendant could not be held liable for fraud where a business owner advertised only that his parking lot was lighted and secure. The Court ruled that the statement did not guarantee a crime free area. *Id*.

However, the Court noted that it was reserving judgment regarding the application of the principles in *Scott* to landlord-tenant law. Therefore, we find *Scott* inapplicable to the factual situation before us.

We find that plaintiff's complaint properly pled a cause of action for fraud and misrepresentation. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992); *Webb v First of Michigan Corp*, 195 Mich App 470, 473; 491 NW2d 851 (1992). She alleged that she had informed defendants R.P. Construction and Patti that she wanted a safe residence and that defendants represented that it was safe and secure. Plaintiff further alleged that the representations were false and were made knowing that they were false or with reckless disregard for their truthfulness. Finally, plaintiff alleged that defendants intended to induce her to purchase by telling her the residence was safe, and she relied on their representations in purchasing the condominium unit. Therefore, we remand plaintiff's fraud and misrepresentation count for further proceedings.

V

Plaintiff further contends that she stated an actionable claim for breach of an implied warranty of habitability. *Weeks v Slavik Builders, Inc*, 24 Mich App 621, 624; 180 NW2d 503 (1970), aff'd 384 Mich 257 (1970). In her complaint, she alleged that R.P. Construction and Patti warranted that the newly built condominium was habitable and free from serious defects which would cause plaintiff injury. She alleged that it was defective, because the doors, windows and security system were not secure in their design and/or installation to prevent the entrance of intruders.

However, plaintiff's complaint contains no allegation of how the intruder gained access to her home or that the security system was engaged at that time. There were insufficient facts pled that the alleged improper construction, installation or design endangered plaintiff. Therefore, we conclude that plaintiff's claim for breach of implied warranty of habitability was properly dismissed.

VI

Plaintiff argues that the trial court improperly granted summary disposition to the landowners of the adjacent property, P.A.P. Plaintiff acknowledges that a landowner's duty generally ends with the boundaries of his premises. However, she asserts that liability is not necessarily precluded where a person is injured outside the premises as a result of a danger posed by a condition on them. *Johnson v Bobbie's Party Store*, 189 Mich App 652; 473 NW2d 796 (1991).

Plaintiff asserts that P.A.P. were required by ordinance to erect a masonry wall, four feet eight inches high on the west side of their property, facing plaintiff's condominium unit. Plaintiff argues that, as P.A.P. did not erect the wall required by the ordinance, the site became overgrown with weeds and became an attractive place for plaintiff's assailant to conceal himself and lay in wait for an opportune moment to initiate his assault.

Although a violation of a statute creates a rebuttable presumption of negligence, a violation of an ordinance is only evidence of negligence. *Id*. at 661. Before a violation of an ordinance may be considered as bearing on the question of negligence, the court must determine that the purpose of the ordinance was to prevent the type of injury and harm suffered. *Id*.

We find that one purpose of the statute was to protect from injury private residents of adjacent properties such as plaintiff. The notice violation to P.A.P. stated the wall is needed for the health, safety and welfare of citizens. Moreover, Clinton Township Supervisor Mark Kohl testified at his deposition that the ordinances are developed to benefit the health, safety and welfare of the citizens and that this type of wall would prevent people from moving back and forth between the two properties. Accordingly, violation of the ordinance can be submitted as evidence of P.A.P.'s negligence.

Moreover, apart from violation of the ordinance, we find that defendant P.A.P. had the duty to maintain its land in such a way as to not create an unreasonable risk of harm to residents on the adjoining property. Here, P.A.P. created a hazard by allowing debris and brush to pile up in the area adjacent to plaintiff's condominium unit. It may be inferred that the overgrown and deteriorating condition of the P.A.P's property attracted plaintiff's assailant as a place of concealment, contributed to the dangerous condition of plaintiff's residence and posed a threat to her personal safety. Therefore, as a matter of law, defendant P.A.P. owed plaintiff a duty.

VII

Finally, defendant P.A.P. argues that their failure to cut the weeds was not the proximate cause of plaintiff's injuries.

A defendant cannot be found liable for negligence unless a plaintiff establishes that the injury in question was proximately caused by the defendant's negligence. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). Proximate cause means such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Id*. Ordinarily, the determination of proximate cause is left for the trier of fact. *Id*.

We find that reasonable minds could differ with regard to whether defendant P.A.P.'s negligence was a proximate cause of plaintiff's injuries. Plaintiff's assailant's actions were not unforeseeable, so as to cut off liability. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). Moreover, we find that a reasonable jury could infer that, but for P.A.P.'s failure to cut their weeds and erect a masonry wall, plaintiff's assailant would not have had the ability to watch her and plan his attack. *Skinner v Square D Company*, 445 Mich 153, 163; 516 NW2d 475 (1994). While it was not the only factor contributing to produce plaintiff's injury, a reasonable jury could conclude it was a substantial factor in bringing it about. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988). The trial judge erred in granting summary disposition to P.A.P.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Myron H. Wahls

[1] 429 Mich 495, 418 NW2d 381 (1988).