STATE OF MICHIGAN

COURT OF APPEALS

SEAN McBRIDE,

Plaintiff-Appellee,

v

PINKERTON'S, INC., d/b/a PINKERTON SECURITY & INVESTIGATION SERVICES,

Defendant-Cross-Plaintiff-Appellee,

and

PM ONE, LTD., d/b/a PM DIVERSIFIED,

Defendant-Cross-Defendant-Appellant,

and

METROPOLITAN REALTY CORP.,

Defendant.

UNPUBLISHED
July 2, 1999

No. 202147
Wayne Circuit Court
LC No. 94-422938 NO

SEAN McBRIDE,

Plaintiff-Appellee/Cross-Appellant,

v

PINKERTON'S, INC., d/b/a PINKERTON SECURITY & INVESTIGATION SERVICES,

Defendant-Cross-Plaintiff-

No. 202204
Wayne Circuit Court
LC No. 94-422938 NO

Appellant/Cross-Appellee,

and

PM ONE, LTD., d/b/a PM DIVERSIFIED,

Defendant-Cross-Defendant-
Appellee/Cross-Appellee,

and

METROPOLITAN REALTY CORP.,

Defendant-Appellee/Cross-Appellee.

Before: Young, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

In these consolidated appeals, defendant Pinkerton Security and Investigation Services ("Pinkerton") appeals as of right from a jury verdict in favor of plaintiff for ten million dollars plus interest and costs. Plaintiff cross-appeals as of right from an order of the trial court granting summary disposition in favor of PM One Ltd. ("PM") and Metropolitan Reality Corporation ("Metro"). PM appeals as of right from an order of the trial court granting summary disposition in favor of Pinkerton on Pinkerton's indemnification claim. We affirm in part, reverse in part, and remand.

Plaintiff filed this negligence case against defendant Pinkerton, the company that contracted to provide security at Wellington Place Apartments ("Wellington Place"), PM, the property management company of Wellington Place, and Metro, the owner of the property. As will be discussed herein, at the time that Pinkerton contracted to provide security services at Wellington Place, PM was serving as the court-appointed receiver of the property, while Metro was the mortgagee and Wellington Place Apartments, Inc., was the owner of title. However, following the termination of the redemption period associated with the receivership proceedings, title to Wellington Place passed to Metro, after which PM contracted with Metro to provide management services for the property.

Although the facts underlying this case were largely disputed at trial, we have been able to glean the following from the evidence presented by the parties. In January 1994, plaintiff decided to move out of his father's house and secure his own place to live. In researching rental communities, plaintiff learned of Wellington Place from a rental community magazine. Attracted to Wellington Place, plaintiff scheduled an appointment to speak with a leasing agent about renting an apartment. Plaintiff met with Savilla Major, a leasing agent at Wellington Place, who spoke to plaintiff about the apartments. According to plaintiff, Major informed him that Wellington Place provided the "extra added feature" of an on-site security guard to maintain security on the premises: Wellington Place is located at 59 Seward

Avenue in a part of Detroit that was characterized at trial as a "high-crime" area. Major also explained to plaintiff that all visitors at Wellington Place were required to sign in before entering the building, and that visitors were not allowed to enter the building unless they entered via the "Centrex" intercom system. The Centrex system required visitors to call the tenant in the building who they were there to see, and then the tenant could "buzz" that visitor through the permanently locked entrance to the building. Unauthorized visitors were denied access to the building first by the Centrex system and second by the security guard on duty. Enticed by, among other amenities, the security measures in place at Wellington Place, plaintiff decided to lease an apartment in the building.

On January 27, 1994, just three weeks after he had moved into his apartment, plaintiff returned home from work and entered the apartment building. While plaintiff was retrieving his mail, he noticed an unusually large number of people loitering in the lobby of the building. As plaintiff walked through the lobby to his apartment, someone in the lobby verbally harassed plaintiff regarding his physical appearance. Specifically, this person asked plaintiff whether he was "a guy or a girl," and called plaintiff a "faggot" and a "gaybob." Plaintiff responded to these remarks by telling the person, "screw you or f-- you." According to plaintiff, the Pinkerton security guard who was on duty that evening took no action in response to this exchange.

After plaintiff went inside his apartment, he changed from his work clothes and decided to purchase some items from a local convenience store. Plaintiff left his apartment and proceeded toward the entrance of the apartment building, and plaintiff's roommate shouted from the apartment for plaintiff to buy him some candy. When plaintiff responded to his roommate, someone in the lobby yelled "shut up." Plaintiff entered the lobby and attempted to ascertain who had told him to shut up, but was unsuccessful. Plaintiff then walked to the convenience store, made his purchases, and returned to the apartment building. However, as plaintiff walked through the lobby, he was again the target of derogatory remarks from people loitering in the lobby. This time plaintiff was called, among other names, a "fag," a "bitch," a "whore," and a "sissy." According to plaintiff, not only did the Pinkerton security guard take no action in response to these remarks, but she actually laughed along with others in the lobby when the remarks were made. Plaintiff ignored the remarks and entered his apartment.

Once again, however, plaintiff needed to leave his apartment to purchase an item at the convenience store. Plaintiff walked through the lobby of the building, and he noticed that the same group of people were still loitering in the lobby. Plaintiff left the building without incident, made his purchases from the store, and returned to Wellington Place, but when he tried to reenter the building he discovered that three of the men who were harassing him inside the building were now standing in the doorway to the building, blocking his entrance. Plaintiff and these men engaged in a brief verbal exchange, in which plaintiff claims that he asked the men to move, when one of the men suddenly shot plaintiff, rendering him paraplegic. According to plaintiff, the Pinkerton security guard was standing on the other side of the doorway and observed the entire verbal exchange as well as the shooting.

At trial, plaintiff presented evidence that this was not the first instance of criminal activity at Wellington Place, nor was this the first time that a Pinkerton security guard on duty had apparently neglected his duties. Jacqueline Dunn-Bell resided at Wellington Place from 1992 until May 1994, at which time she moved out because she was "terrified" of living in the building. Dunn-Bell testified that

she had been robbed at gunpoint on two occasions, and that, on at least three occasions, she had received visitors to her ninth-floor apartment who had not signed in or been buzzed in via the Centrex system, but had nonetheless managed to bypass the Pinkerton security guard on duty in the lobby. Dunn-Bell brought these events to the attention of both Wellington Place management and Pinkerton management. Dunn-Bell also testified that on numerous occasions, she personally witnessed Pinkerton security guards socializing with guests, watching television, and otherwise not performing security functions that she thought were expected of them.

Robin Prentice, a resident manager at Wellington Place, testified that sometime before plaintiff was shot, she had met with Mike Curtis, a supervisor at Pinkerton, regarding the poor performance of the Pinkerton security guards assigned to Wellington Place. Specifically, Prentice testified that she informed Curtis that Pinkerton security guards were sleeping on the job, not signing visitors in as required, and were allowing visitors to bypass the Centrex system. Prentice testified that, following her meeting with Curtis, the problems about which she complained continued. In light of poor performance of the Pinkerton security guards assigned to Wellington Place, Prentice indicated that she was concerned for the safety of the resident of the building.

There were several additional facts that were in dispute, which will be discussed later in this opinion.

I

We first address Pinkerton's argument that the trial court erred in denying its motion for a JNOV. We review a trial court's decision to grant or deny a JNOV for whether the evidence and all legitimate inferences arising from the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Forge v Smith*, 458 Mich 198, 203-204; 580 NW2d 876 (1998).

Pinkerton argues that the trial court erred in not granting its motion for a JNOV because Pinkerton did not owe plaintiff a duty to protect him from the assault that resulted in his injuries. The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Whether a defendant owes a duty to a particular plaintiff is generally a question of law for the court to decide, *Schmidt v Youngs*, 215 Mich App 222, 224; 544 NW2d 743 (1996), after it examines "a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Schultz*, *supra* at 450. Whether the breach of a particular duty owed by a defendant was a proximate cause of a plaintiff's injury is generally a question of fact for the jury, unless it can be said that reasonable minds could not differ regarding the cause of the plaintiff's injury, in which case the court should decide the issue as a matter of law. *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998).

As a preliminary matter, it must be acknowledged that in the absence of some "special relationship" or circumstances, one party generally does not have a duty to aid or protect another

person. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). Some generally recognized special relationships include invitor-invitee, common carrier-passenger, innkeeper-guest, landlord-tenant, employer-employee, and doctor-patient/psychiatrist-patient. *Murdock v Higgins*, 454 Mich 46, 55 n 11; 559 NW2d 639 (1997). In this case, no special relationship existed between plaintiff and Pinkerton that would have given rise to a duty on the part of Pinkerton to act in a manner that would have prevented plaintiff's injuries.

Further, despite plaintiff's arguments to the contrary, plaintiff is not a third-party beneficiary of the security contract between Pinkerton and PM. To be an intended third-party beneficiary, the promisor must have undertaken to do something to or for the benefit of the party asserting such status. *Rieth-Riley Construction Co Inc v Dep't of Transportation*, 136 Mich App 425, 429-430; 357 NW2d 62 (1984); MCL 600.1405; MSA 27A.1405. An objective test is used to determine the claiming party's status, and focuses upon the contract itself. *First Security Savings Bk v Aitken*, 226 Mich App 291, 307; 573 NW2d 307 (1997). Where the contract is intended to primarily benefit its signatories, the mere fact that a third person would be incidentally benefited does not entitle that person to its protection. *Alden State Bk v Old Kent Bk--Grand Traverse*, 180 Mich App 40, 44; 446 NW2d 599 (1989). In this case, the language of the security contract clearly states the parties to the contract did not intend to benefit any third party and that the parties contracted solely for their own benefit. The mere fact that plaintiff may have incidentally benefited from the contract does not give him rights as a third-party beneficiary.

However, even in the absence of a special relationship or a contractual relationship, Michigan courts have recognized a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. See, e.g., *Blackwell v Citizens Ins Co of America*, 457 Mich 662; 579 NW2d 889 (1998); *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981); *Braun v York Properties, Inc*, 230 Mich App 138; 583 NW2d 503 (1998); *Courtright v Design Irrigation, Inc*, 210 Mich App 528; 534 NW2d 181 (1995). This duty of care is expressed with regard to third parties in § 324A of the 2 Restatement of Torts, 2d, p 142, which provides:

> One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Our Supreme Court in *Smith*, *supra* at 705, acknowledged the viability of a theory of liability under § 324A. See also *Courtright*, supra at 531 ("[Section] 324A of the Second Restatement of Torts has been accepted as a correct statement of Michigan law.")

Relying on § 324A, plaintiff maintains that, pursuant to the security contract, Pinkerton assumed a duty to provide PM with security services, which Pinkerton should have recognized were designed for the protection of plaintiff and the other tenants of Wellington Place. We agree. Pinkerton does not dispute that it contracted with PM to provide a limited level of security at Wellington Place. Although broadly defined, the duties assumed by the Pinkerton security officers included the following: a duty to observe and notify their superiors or the police of reportable activity; a duty to ensure that guests sign in and out when coming and going from the apartment complex; a duty to ensure that the intercom procedure was followed, i.e., no guest should be allowed entry unless admitted by a tenant via the Centrex system; a duty not to socialize while working; and a duty to contact either Pinkerton dispatch, the apartment management, or the police if a situation developed that the security officer could not handle or otherwise could not decide what course of action to follow. We were able to discern these duties by examining the security contract between Pinkerton and PM, the post orders associated therewith, and the testimony of agents of both Pinkerton and PM.

We conclude that the nature of Pinkerton's undertaking to provide security services at Wellington Place should have caused Pinkerton to recognize that the services were designed, at least in part, for the protection of the tenants of Wellington Place. Accordingly, we find, as a matter of law, that Pinkerton voluntarily assumed a duty to provide a limited level of security services for the protection of the tenants of the apartment complex, including plaintiff, and that this limited level of security encompassed the duties discussed above.

Further, it was disputed at trial whether Shawnaa Robinson, the Pinkerton security guard on duty on the night that plaintiff was injured, breached duties owed to plaintiff and the other tenants of Wellington Place. Robinson testified that when the assailants first began their verbal harassment of plaintiff, she warned them that they would have to leave the complex if they continued the harassment. She also testified that following the assailants' continued harassment of plaintiff, she actually ordered them to leave the facility. According to Robinson, it was then that the assailants proceeded to the entrance of the apartment complex and shot plaintiff, who was attempting to reenter the building. Robinson did not know how the assailants gained access to the apartment building, or whether they had signed in as required. Robinson presumed, however, that the assailants were in the lobby at the invitation of other tenants, yet she made no effort to confirm this during any of the instances of harassment.

One of the assailants, Mantu Judkins, disputed Robinson's testimony. Judkins testified that Robinson never asked the assailants to stop harassing plaintiff, nor did she ever ask them to leave the apartment building. According to Judkins, Robinson did not address the assailants in any manner while they loitered in the lobby and harassed plaintiff. Further, plaintiff testified that, rather than taking action against the assailants, Robinson actually laughed at the comments that the assailants directed at him.

Once a defendant's legal duty is established, whether a defendant has breached that duty is a question of fact for the jury to decide. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 613; 537 NW2d 185 (1995). Given the dissimilar renditions of the facts and circumstances surrounding the conduct of Pinkerton's agent, Robinson, on the night that plaintiff was injured, we believe that the question whether Pinkerton breached duties owed to plaintiff, as a tenant of Wellington Place, was properly submitted to the jury.

Further, as indicated above, in a negligence case, the determination of proximate cause is left to the trier of fact, unless reasonable minds could not differ regarding the proximate cause of a plaintiff's injuries, in which case the court should decide the issue as a matter of law. *Christensen*, *supra*. The question of proximate cause depends in part on foreseeability. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977); *Ross v Glaser*, 220 Mich App 183, 192; 559 NW2d 331 (1996). Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Ross*, *supra* at 193. It involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. *Id*. In viewing the evidence in the light most favorable to plaintiff, we cannot say that reasonable minds could not have found that Pinkerton's alleged breaches of its voluntarily assumed duties proximately caused plaintiff's injuries.

We are aware of this Court's recent decision in *Krass v Tri-County Security, Inc*, 233 Mich App 661; __ NW2d __ (1999). In *Krass*, an agent of a security company directed the plaintiff's decedent to park his car in a parking lot owned by a merchant who hired the security company to provide security for its property. When the plaintiff's decedent returned to his car the next morning, he was shot and killed on the merchant's property. The plaintiff's decedent filed suit against the security company, alleging, among other things, that the security company failed to properly protect plaintiff's decedent or to control the premises. The trial court granted summary disposition in favor of the security company, and this Court affirmed that decision, holding that a merchant (and, here, derivatively the security company that it hires) who voluntarily takes safety precautions against the general societal problem of crime (here, by hiring the security company to provide parking lot patrol and serve as a deterrent to crime) cannot be sued "on the theory that the safety precautions were less effective then they could or should have been." *Id*. at 684.

We find that this Court's decision in *Krass* does not require us to reach a different result in this case. The present case arises from a tenant's claims against his landlord and the security company that it hired, while the decision in *Krass* concerned a business invitee's suit against a merchant and the security company that it hired. In affirming the decision of the trial court, this Court in *Krass* primarily relied on our Supreme Court's decisions in *Williams*, *supra*, and the later case of *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993), both of which involved claims of a business invitee against a merchant. Importantly, however, our Supreme Court in *Scott*, *supra* at 452 n 15, expressly reserved its opinion regarding the application of the principles discussed in *Scott* to the area of landlord-tenant law, which is directly implicated in this case. Thus, *Krass* does not affect our analysis in this case.

Accordingly, the trial court did not err in denying Pinkerton's motion for a JNOV.

II

Pinkerton also argues that the trial court erred in admitting certain trial testimony. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). When reviewing a court's decision to admit evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was a kind properly considered by the jury. *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993).

According to the challenged trial testimony, the individuals implicated in plaintiff's shooting had allegedly robbed a pizza delivery man and stole his car the day before the shooting in this case. After committing the crimes, the assailants sought refuge in the Wellington Place lobby. Plaintiff argued that the evidence was relevant because the Pinkerton security guard who was on duty on the night that plaintiff was injured was also working on the day of the robbery, yet she attested to the police officer investigating the shooting that she had never seen the assailants before. The trial court ruled that plaintiff could elicit testimony about whether Pinkerton's agent had seen the assailants before the shooting, but could only elicit testimony about the robbery if plaintiff demonstrated that Pinkerton's agent knew of those crimes. At trial, however, plaintiff elicited testimony about the robbery from another resident, Otha White, without first making the required showing required by the trial court. Pinkerton objected and a bench conference occurred off the record, after which the trial court did not sustain the objection or instruct the jury to disregard the witness' statement about the crimes.

Because we have previously determined that the trial court correctly decided that Pinkerton owed a duty of care to plaintiff, then the remaining issues that the jury had to decide was whether Pinkerton's agent was negligent in fulfilling her duties as a security guard and whether that negligence proximately caused plaintiff's injuries. In analyzing the negligence claim, the jury could have reasonably surmised that plaintiff had failed to show notice on the part of Pinkerton's agent because the testimony about the crimes was elicited only from another resident. Moreover, the evidence of a nonviolent robbery does not explicitly reveal an assailant's propensity to shoot people with whom he has confrontations. In sum, because the trial court was in the best position to judge the prejudicial effect of the evidence, we conclude that its decision to admit the testimony did not rise to a level constituting an abuse of discretion.

III

Pinkerton and PM next argue that the trial court erred in admitting expert testimony on calculating plaintiff's possible "hedonic" damages, which Michigan's standard jury instruction refers to as "damages for denial of social pleasure and enjoyment." See SJI2d 50.02. Neither party argues against an award of damages for denial of social pleasures and enjoyment, an award long recognized in Michigan, see, e.g., *Beath v Rapid R Co*, 119 Mich 512; 78 NW 537 (1899); rather, the parties only contest plaintiff's use of an expert witness to explain such damages to the jury.

Although PM and Pinkerton argue that we should review de novo the trial court's decision to admit the expert testimony, we disagree. A trial court's decision to admit expert testimony under MRE 702 or to exclude it as speculative is reviewed for an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989); *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). Further, in order to properly preserve an objection to the admissibility of evidence, the objecting party must object at trial and specify on appeal the same grounds for challenging the evidence that it did below. MRE 103(a)(1); *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997).

The record reveals that, although Pinkerton stated during trial that hedonic damages are not authorized under Michigan law, a proposition that we have already indicated is without merit, *Beath, supra*, Pinkerton did not contend at trial that evidence concerning plaintiff's hedonic damages should not be presented to the jury via expert testimony. Rather, a review of the record reveals that plaintiff first raised this specific argument in its motion for a JNOV. Therefore, although we have serious doubts about the propriety of permitting evidence of hedonic damages by way of expert testimony, see *Kurncz v Honda North America, Inc*, 166 FRD 386 (WD Mich, 1996), and cases cited therein, we decline to address this issue on appeal because the issue was not placed squarely within the lower court's discretion during trial.

IV

Pinkerton also argues that that the trial court erred in denying its motion for a mistrial in the wake of the testimony of PM employee Savilla Major, who Pinkerton claims was a surprise witness. This court will not reverse the denial of a motion for a mistrial unless it is shown that the denial constituted an abuse of discretion. *Carbonnell v Bluhm*, 114 Mich App 216, 222; 318 NW2d 659 (1982).

In response to plaintiff's witness list, which contained 246 witnesses, Pinkerton states that it sent plaintiff interrogatories, asking him to specify which witnesses would be called, what the substance of their testimonies would be, and other related information. Plaintiff asserts that it objected to the interrogatory as unduly burdensome and overbroad. However, without waiving its objection, plaintiff informed Pinkerton that the information sought was unknown to him at that time. Pinkerton did not file a motion to compel discovery on this matter.

At trial, Major, the 113th witness on plaintiff's witness list, was called to testify by plaintiff. Major testified regarding the eviction of one of the assailants, Mantu Judkins, from the apartment complex for carrying a shotgun on the premises. She claimed that she informed various Pinkerton security guards as well as PM management about the incident and that she instructed the same that Judkins should be denied access to the apartment building because of threats that he had made. Following her testimony, Pinkerton moved for a mistrial. The trial court denied the motion, finding that Major, as a managerial employee of co-defendant PM, should have been known to Pinkerton in advance of her trial testimony. We cannot say that the trial court's reasons for denying a mistrial constituted an abuse of discretion.

In a related argument, Pinkerton argues that the trial court erred in denying its motion, in response to Major's testimony, to supplement its witness list with additional guards who worked in the apartment building during the time period surrounding the shooting. This Court reviews a decision whether to allow a party to supplement its witness list for an abuse of discretion. *Butt v Giammariner*, 173 Mich App 319, 321; 433 NW2d 360 (1988). The trial court denied Pinkerton's request, stating that "the only security guard relevant was the one that was there that night." Because Major conceded that she could not recall whether she ever spoke to the Pinkerton guard on duty at the time of plaintiff's shooting, we cannot say that the trial court abused its discretion in precluding Pinkerton from exploring the subject further.

V

Pinkerton also argues that because plaintiff had tested positive for the human immunodeficiency virus (HIV) in 1989, the trial court erred in not instructing the jury with the optional standard jury instruction in SJI2d 53.01, relating to plaintiffs who are not in ordinarily good health. This Court reviews claims of instructional error for abuse of discretion. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).

Before trial, Pinkerton argued that because plaintiff was HIV-positive, he should not be permitted to rely on the mortality table found at MCL 500.834; MSA 24.1834, nor SJI2d 53.01, the standard jury instruction employing the use of the table. Pinkerton based its argument on the optional sentence of the standard jury instruction that states, "This mortality table is to be considered by you in determining life expectancy only if you find that plaintiff was in ordinarily good health before sustaining the injuries complained of." The trial court, however, disagreed with Pinkerton and instructed the jury in accordance with the standard jury instruction, declining to read the optional sentence, reproduced above, and instead concluded with the optional sentence in the instruction concerning the conclusive nature of the mortality table, which provides:

> These mortality figures are conclusive on the question of life expectancy, since no evidence has been presented to show that the Plaintiff has a probability of life greater or less than that indicated by the table.

We conclude that the trial court's instructions to the jury did not constitute an abuse of discretion. Neither party has pointed to any evidence admitted at trial that supports the view that plaintiff has a life expectancy less than that indicated in the mortality table, Further, at a post-trial hearing the trial court explained that plaintiff "could be HIV positive for the next eight years and then there could be a cure, and he continue to live another 53 years." We believe that the trial court's reasoning is sound. Accordingly, the trial court did not abuse its discretion in giving the jury the conclusive form of the instruction.

VI

Pinkerton finally argues that the trial court was not permitted to award plaintiff pre-judgment interest on the entire jury award of ten million dollars. An award of interest, pursuant to MCL 600.6013; MSA 27 A.6013, is reviewed de novo on appeal. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 623-624; 550 NW2d 580 (1996).

Entitlement to interest on a judgment is statutory and must be specifically authorized by statute. *Dep't of Transportation v Schultz*, 201 Mich App 605, 610; 506 NW2d 904 (1993). Interest on civil money judgments is provided for in MCL 600.6013; MSA 27A.6013. This statute states in relevant part that "[f]or complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment." Future damages are those arising from personal injury that accrue after the trier of fact makes its damage findings. MCL 600.6301(a); MSA 27A.6301(a).

Here, the jury awarded plaintiff a total damages award of ten million dollars. The parties stipulated to using a straight jury verdict form that did not require the jury to specify how much of its award was for past or future damages. The trial court further awarded pre-judgment interest on the entire amount awarded by the jury, which from the date plaintiff filed his complaint amounted to an additional interest award of $1,958,020. Pinkerton contends that the trial court erred in awarding pre-judgment interest on the entire jury award because plaintiff failed to show which portion of the jury's award was for future damages. We disagree.

Pinkerton's argument placing the burden of proof upon plaintiff is without merit because MCL 600.6013; MSA 27A.6013 is remedial and should be liberally construed in favor of the prevailing party. See, e.g., *Denham v Bedford*, 407 Mich 517, 528; 287 NW2d 168 (1980); *Southfield Western, Inc* v *Southfield*, 206 Mich App 334, 339; 520 NW2d 721 (1994). Moreover, a prevailing party is entitled to statutory interest even if the order of judgment does not expressly provide for the interest. *Dep't of Treasury v Central Wayne Co Sanitation Auth*, 186 Mich App 58, 64; 463 NW2d 120 (1990). Finally, because Pinkerton agreed to the use of a straight jury verdict form, which did not require the jury to allocate past and future damages, Pinkerton will not now be heard to complain that the trial court erred in awarding statutory interest on the entire jury award.

Accordingly, the trial court's interest award was not erroneously entered.

VII

We next address PM's argument that the trial court erred in granting summary disposition in favor of Pinkerton on Pinkerton's claim that PM was contractually bound to indemnify Pinkerton for any damages that it might be required to pay as a result of Pinkerton's negligence in providing security for the apartment complex. We disagree.

An indemnity contract is construed in the same fashion as are contracts generally. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). Indemnity contracts should be construed to effectuate the intent of the parties, which may be determined by considering the language of the contract, the situation of the parties, and the circumstances

surrounding the making of the contract. *Id*. A court should construe a contractual provision providing for indemnity strictly against the party who drafts the contract and the party who was the indemnitee. *Id*. Where the terms of a contract are clear and unambiguous, a court must enforce those terms as written, and their construction is for the court to determine as a matter of law. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

It is undisputed that at the time that the security contract was executed, PM was serving as court-appointed receiver of Wellington Place Apartments. Pursuant to the terms of the receivership order, PM had the specific authority to execute contracts providing for the security of the property. The security contract provided, in pertinent part, as follows:

> V. INSURANCE AND INDEMNIFICATION
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> * * *
>
> b. It is understood and agreed between the parties that Pinkerton is not an insurer, and that the rates being paid for service is for a security officer, service designed to deter certain risks of loss, which rates are not related to the value of the personal or real property protected. All amounts being charged by Pinkerton are insufficient to guarantee that no loss will occur, and Pinkerton makes no guarantee, implied or otherwise, that no loss will occur or that the service supplied will avert or prevent occurrences or losses which the service is designed to help detect or avert. In no event shall Pinkerton liability exceed Two Thousand Five Hundred Dollars ($2,500.00). Client shall indemnify and hold Pinkerton harmless from any loss, claim, demand, liability, cause of action or judgment including but not limited to injury or death to persons or damage or loss of property whether or not well grounded and whether and whether or not any negligence, misconduct or breach of duty by Pinkerton's agents, servants, employees or personnel is alleged to have contributed thereto, in whole or in part. Client's obligation to indemnify, defend and hold Pinkerton harmless shall be irrespective of whether Pinkerton or its agents, servants, employees or personnel is alleged to have been actively negligent, passively negligent, or any combination thereof. In addition, at its own expense, Client shall defend any such claim, demand, liability, cause of action or judgment which is asserted against Pinkerton. Client shall also reimburse Pinkerton for all legal expenses Pinkerton incurs in defending itself against any such claims which client fails to defend, together with any legal expenses Pinkerton incurs in enforcing any other [of] the terms, conditions, covenants or promises of this agreement.
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> * * *
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> d. The entire agreement of the parties is expressed herein and no understandings, agreements, purchase orders, work orders or other documents shall modify the terms and conditions of this agreement. Pinkerton expressly limits acceptance to the terms and conditions herein which acceptance may be evidenced by either a representation of

> Client executing the Schedule of Security Services or by Client accepting the services performed by Pinkerton.

PM first argues that an examination of the "surrounding circumstances doctrine" precludes application of the indemnity provision against it. The surrounding circumstances doctrine provides that "if a contractual term is otherwise ambiguous or subject to more than one possible construction within the four corners of the written instrument and the circumstances or relations of the parties underlying the contract resolve that ambiguity, the Court must inquire into them in performing its interpretive function." *Id*., 607. However, our review of the indemnity clause reveals no ambiguity that would permit us, or the lower court, to look beyond the four corners of the contract. On the contrary, the language of the indemnity clause clearly and unambiguously imposes a duty upon the "Client" to indemnify and defend Pinkerton even if Pinkerton or its agents, servants, employees, or personnel are alleged to have been negligent.

Although PM concedes that its employee signed the security contract, PM argues that, as the court-appointed receiver of Wellington Place, it could not have been a party to the contract. We disagree. The contract was signed by George Brice, an employee of PM who served as a resident manager at Wellington Place while PM was acting as receiver of the property during foreclosure proceedings. Further, the record reveals that Brice was authorized to enter into the security contract by Elizabeth Lane, a property manager at PM. Although PM argues that its only role was that of a receiver in the foreclosure proceedings, PM's employee signed the contract under the term "Client" with the express authorization of a PM property manager. We conclude that PM is bound by the terms of the contract that it authorized its agent to sign.

PM also contends that operation of the statute of frauds, MCL 566.132(1)(b); MSA 26.922(1)(b), should have prevented the trial court from enforcing the indemnity provision. Again, we disagree. MCL 566.132(1)(b); MSA 26.922(1)(b) provides, in relevant part, that a "promise to answer for the debt default, or misdoings of another person" is void unless the agreement is in writing and signed by the person to be charged with the agreement. Because we have already determined that PM, the party to be charged with the agreement, authorized its agent, Brice, to sign the written contract that provided Pinkerton with indemnity, we conclude that the contract complies with the statute of frauds.

PM also argues that the indemnity provision is unenforceable pursuant to MCL 691.991; MSA 26.1146(1), which provides:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Specifically, PM maintains that because Pinkerton conceded in the trial court that the security contract at issue in this case constituted a contract concerning the "maintenance" of Wellington Place Apartments, the indemnity provision in the contract is void and unenforceable and is against public policy as expressed in MCL 691.991; MSA 26.1146(1).

First, we note that Pinkerton's acknowledgment in the court below that the security contract concerned an agreement for the "maintenance" of the apartment complex does not control our analysis of this issue because whether the contract at issue falls within MCL 691.991; MSA 26.1146(1) is a question of law. See *In re Ford Estate*, 206 Mich App 705, 708; 522 NW2d 729 (1994) (the stipulation of parties do not bind an appellate court when a question of law is implicated).

Further, we disagree with PM's contention that the indemnity provision is void as a matter of public policy because it falls within the proscription of MCL 691.991; MSA 26.1146(1). The interpretation of a statute is a question of law, which we review de novo on appeal. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. *Id*., 309. The first criterion in determining intent is the specific language of the statute. *Id*., 310. The Legislature is presumed to have intended the meaning it plainly expressed, and when the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted. *Id*. However, if a statute is ambiguous and reasonable minds can differ as to the meaning of the statute, judicial construction is permitted. *Id*., 311.

We believe that the plain language of MCL 691.991; MSA 26.1146(1) reveals that when the Legislature determined to void certain contracts for indemnification relative to "the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith," it did not intend to void indemnification provisions in contracts that provide for building security. In our opinion, the plain language of MCL 691.991; MSA 26.1146(1) compels a conclusion that the Legislature sought to void only certain indemnification provisions in contracts relative to the construction and building industry, not the security industry. See *Peeples v Detroit*, 99 Mich App 285, 295; 297 NW2d 839 (1980) ("In the building and construction industry, public policy, as expressed by MCL 691.991; MSA 26.1146(1), prohibits an indemnitee from recovering for his sole negligence."). Moreover, no Michigan court has applied MCL 691.991; MSA 26.1146(1) to void an agreement outside the context of the building and construction industry. Accordingly, we are not persuaded by PM's argument that MCL 691.991; MSA 26.1146(1) operates to void the indemnification provision in the present contract. The contract at issue in this case was for the provision of security services for Wellington Place Apartments and not "for the construction, alteration, repair or maintenance" of the facility.

PM next argues that the provisions of the Michigan Consumers Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, operate to render the indemnification provision unenforceable. However, having found no evidence that the provisions of the MCPA were violated, we conclude that PM's claim under the MCPA is without merit.

PM finally argues that the indemnification provision is unenforceable for lack of "mutuality of obligation." In Michigan, the essential elements of a valid contract are (1) parties competent to

contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v Struggles*, 289 Mich 595; 286 NW 844 (1939). Mutuality of obligation simply means that both parties are bound to an agreement or neither is bound. *Domas v Rossi*, 52 Mich App 311, 315; 217 NW2d 75 (1974). Here, the contract obligated Pinkerton to supply security services and PM to pay for such services. Both parties were bound to the agreement. PM's agreement to indemnify Pinkerton for losses resulting from Pinkerton's negligence in the performance of its contractual duties does not render the contract void for lack of mutuality of obligation. While indemnity clauses are construed strictly against the party who drafts the contract and the party who is the indemnitee, *Triple E Produce*, *supra*, such contractual provisions are nonetheless enforceable and not void for lack of mutuality of obligation.

Accordingly, we conclude that the trial court did not err in granting summary disposition in favor of Pinkerton on its indemnity claim against PM.

VIII

Plaintiff finally argues in his cross appeal that the trial court erred in granting summary disposition in favor of PM and Metro pursuant to MCR 2.116(C)(8) and (10) based on its finding that landlords are not responsible for third-party criminal acts. We agree. Accordingly, we reverse the decision of the lower court granting PM and Metro summary disposition.

We review de novo a trial court's decision on a motion for summary disposition. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). However, because the lower court presumably considered the parties' submitted documents that were outside the pleadings, we review this issue according to the standard for motions granted pursuant to MCR 2.116(C)(10). See *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Baker*, *supra*. We must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion. *Id*. Our task is to review the record evidence, draw all reasonable inferences from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id*.

Questions regarding duty are for the court to decide as a matter of law. *Scott*, *supra* at 448. Generally, a person does not have a duty to aid or protect another person endangered by a third person's conduct. *Williams*, *supra* at 498-499. However, an exception to this general rule exists when there is a special relationship between a plaintiff and a defendant. *Id*. at 499. The rationale underlying the recognition of a duty to protect in these special relationship situations is control, i.e., one person entrusts himself to the control and protection of another such that a duty to protect is imposed upon the person in control because that person is in the best position to provide a place of safety. *Id*. As previously noted, the landlord-tenant relationship is recognized under Michigan law as a "special relationship" upon which a duty to aid or protect may be premised. *Murdock*, *supra*.

Although our Supreme Court has had occasion to address the scope of a duty to aid and protect in the context of cases where the defendant is a merchant and the plaintiff is an invitee, *Mason v*

Royal Dequindre, Inc, 455 Mich 391; 566 NW2d 199 (1997); *Scott, supra*; *Williams, supra*, as previously indicated, the Court has reserved its opinion regarding the applicability of the principles discussed in those cases to the area of landlord-tenant law, *Scott*, *supra* n 15. However, this Court in *Holland v Leidel*, 197 Mich App 60, 62; 494 NW2d 772 (1992), stated, "[a] landlord has the duty to protect tenants from foreseeable criminal activities of third parties in the common area of the landlord's premises." Citing *Samson v Saginaw Professional Building, Inc*, 393 Mich 393, 407-408; 224 NW2d 843 (1975); *Johnston v Harris*, 387 Mich 569, 198 NW2d 409 (1972); *Rodis v Herman Kiefer Hosp*, 142 Mich App 425, 428-429; 370 NW2d 18 (1985); *Aisner v Lafayette Towers*, 129 Mich App 642, 645; 341 NW2d 852 (1983).

In *Williams, supra* at 502 n 17, our Supreme Court noted the difference between a merchant-invitee relationship and that involving a landlord and his tenant.

> We find that a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees. Should a dangerous condition exist in the common areas of a building which tenants must necessarily use, the tenants can voice their complaints to the landlord. Thus, in *Samson*, *supra* at 408-411, we upheld a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building, noting that the landlord's duty may be slight. The relationship between a merchant and invitee, however, is distinguishable because the merchant does not have the same degree of control. When the dangerous condition to be guarded against is crime in the surrounding neighborhood, as it is in the present case, the merchant may be the target as often as his invitees. Therefore, there is little the merchant can do to remedy the situation, short of closing his business.

Our Supreme Court's decision in *Samson*, *supra*, which is noted in *Williams* and cited by this Court in *Holland*, *supra*, presented a situation in which a defendant landlord leased space in its office building to a mental health clinic. The plaintiff was employed by an attorney who also maintained offices in the building. While using the elevator in the building, the plaintiff was assaulted by a knife-wielding patient of the mental health clinic who was also using the elevator. For some time before the assault, other tenants of the defendant had complained about the use of the elevators and stairwells by patients of the clinic. To these tenants, the possibility of a patient committing a criminal act was foreseeable, though no prior criminal events involving clinic patients had occurred in the building. However, despite the concerns expressed by the other tenants, the defendant took no action to alleviate their uneasiness.

Our Supreme Court held that although the defendant could not be liable for the act of leasing space to the mental health clinic, there were sufficient questions of fact regarding the defendant's conduct respecting the common areas of the facility to warrant a claim of negligence.

> The common areas such as the halls, lobby, stairs, elevators, etc., are leased to no individual tenant and remain the responsibility of the landlord. It is his responsibility to insure that these areas are kept in good repair and reasonably safe for the use of his tenants and invitees.

> The existence of this relationship between the defendant and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of harm. 2 Restatement Torts, 2d, § 314A (3).
>
> The fact that such an event might occur in the future was foreseeable to this defendant. It had even been brought to its attention by other tenants in the building. The magnitude of the risk, that of a criminally insane person running amok within an office building filled with tenants and invitees, was substantial to say the least. To hold that, possessed of these facts and no other, this defendant should have inquired further into the reasonableness of its inaction, i.e., the probability of such an event occurring in the future, and that its failure to make an inquiry may be deemed negligence on its part, does not shock the conscience of this Court. [*Samson*, *supra* at 407-408.]

Notably, and crucial to our analysis in this case, the Court also held as follows:

> Whether the care exercised was reasonable under the circumstances is for the jury to determine. [*Id*. at 407.]

We conclude that the analysis employed by our Supreme Court in *Samson* supports our conclusion that the trial court erred in granting summary disposition to PM and Metro on plaintiff's claim of negligence. Although a landlord is not an insurer of the safety of its tenants – nor do we believe it ever could be – a landlord is nonetheless obligated to see that the common areas are reasonably safe for the use of its tenants, *Samson*, *supra* at 407, an obligation that includes protecting tenants from the foreseeable criminal activities of third parties, *Holland*, *supra*.

We recognize, however, that in determining whether a duty exists, we must examine a variety of factors, including the relationship of the parties and the foreseeability and nature of the risk. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). "Most importantly, for a duty to arise there must exist a sufficient relationship between the plaintiff and the defendant." *Id*. We conclude that the existence of the landlord-tenant relationship in this case is sufficient to support the recognition of a duty on the part of PM and Metro to implement the specifically promised security measures in a non-negligent manner. Further, plaintiff's injuries in this case were not so unforeseeable as to relieve PM and Metro of this duty.

> Foreseeability . . . depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions. But the mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which he perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act. [*Samson*, *supra* at 406.]

Even in cases involving claims by invitees against merchants, our Supreme Court and this Court have found that merchants are potentially liable for not protecting their identifiable invitees from the foreseeable criminal acts of third parties. *Mason*, *supra*; *Jackson v White Castle System, Inc*, 205

Mich App 137; 517 NW2d 286 (1994); *Green v Shell Oil Co*, 181 Mich App 439; 450 NW2d 50 (1989); *Diomedi v Total Petroleum, Inc*, 181 Mich App 789; 450 NW2d 91 (1989); *Mills v White Castle System, Inc*, 167 Mich App 202; 421 NW2d 631 (1988).

PM and Metro argue that the Pinkerton security guard could not have reasonably anticipated that a tenant would be shot outside the apartment building. In contrast, plaintiff argues that the verbal exchanges inside the lobby did not render the crime so random and instantaneous that the Pinkerton security guard lacked notice to exercise reasonable care for the protection of plaintiff. Moreover, plaintiff argues that that PM and Metro had notice in the form of earlier complaints by tenants about loitering in and around the building and the failure to enforce the intercom system.

Under the circumstances of this case, we cannot say that plaintiff's injuries were unforeseeable. On at least two occasions, plaintiff, a tenant residing in the apartment building, was verbally harassed by nontenants who were loitering in the lobby. Although plaintiff himself testified that he was accustomed to such remarks, we do not believe that plaintiff's thick skin should act to relieve the Pinkerton security guard, and thus PM and Metro, of their duty to act reasonably to protect plaintiff from the criminal acts of those harassing him. The nature of the verbal harassment was both personal and offensive, and we do not find it unforeseeable that the verbal harassment ultimately escalated to a physical confrontation. Although we would not disagree that the specific nature of plaintiff's assault and injuries might not have been foreseen, i.e., that plaintiff would be shot multiple times and rendered paraplegic, the nature of plaintiff's injuries and the manner in which he received them nonetheless resulted from a reasonably foreseeable physical confrontation between plaintiff and his assailants. See *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995).

Accordingly, the trial court erred in granting summary disposition in favor of PM and Metro.

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

/s/ William B. Murphy