STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINA SMITH,

Plaintiff-Appellee,

v

DANBURY PARK MANOR, DENNIS J. VARIAN, SUGARBERRY APARTMENTS CORP., and DPM ASSOCIATES LIMITED PARTNERSHIP,

Defendants-Appellants.

UNPUBLISHED
June 23, 2000

No. 207152
Washtenaw Circuit Court
LC No. 95-002320 NO

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment entered after a jury verdict awarding plaintiff damages amounting to $198,025.23.

Plaintiff commenced this action alleging negligence and breach of contract after she was robbed and sexually assaulted by an assailant who broke into her apartment through a basement window. While defendant raises a large number of alleged trial court errors, this opinion need only focus on several dispositive evidentiary issues.

This Court reviews for an abuse of discretion the trial court's decisions regarding the admissibility of evidence. *Grow v W A Thomas Co*, 236 Mich App 696, 711; 601 NW2d 426 (1999). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the trial court's ruling. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

I

A

At trial, defendants challenged the relevance of testimony and documents concerning Danbury Park Manor (DPM)'s allegedly poor maintenance. During the testimony of William Diesenroth, a twenty-year DPM resident, plaintiff introduced approximately eight documents purportedly prepared by the Department of Housing and Urban Development (HUD). Diesenroth generally indicated his recognition of these documents based on his contact with HUD in his capacity as a founder of a DPM tenants association. The DPM tenants formed their association and contacted HUD because they had difficulty securing repairs of "[e]verything from refrigerators that no longer refrigerated to leaking pipes that had rotted out floors to tiles in kitchen floors that had come up, torn rugs. All types of maintenance problems." While none of these documents generated by HUD appear within the lower court record provided this Court, a review of Diesenroth's testimony to some degree substantiates their contents. They address repair problems with respect to carpet, kitchen cabinets, leaks, sinks, sewage systems, refrigerators, doors, door knobs, door frames, window caulking and screens, in addition to overgrown shrubbery and litter concerns.

This information regarding repair problems is completely irrelevant to plaintiff's claim.[1] Relevance requires some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Plaintiff alleged that defendant failed to provide her a secure living environment and failed to protect her from danger. The above-enumerated litany of alleged maintenance deficiencies simply had no tendency to establish defendants' negligent failure to provide plaintiff a secure environment.[2] Diesenroth himself indicated that "HUD is not concerned with security. . . . HUD was looking for not security problems, they were looking for safety problems. They were looking for torn rugs, tiles that were missing from kitchen floors. Perhaps door locks would be of concern to them and the condition of

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[1] Although defense counsel did not specifically object on the basis of relevance to Diesenroth's discussion regarding the HUD documents, prior to plaintiff's introduction of the HUD documents defense counsel had objected that the "whole line of questioning [concerning DPM's premises repairs] is irrelevant. This case is not about repairs of the premises. This case is about whether or not security devices were placed on windows and whether or not lighting was appropriate. That was my objection at the beginning of this trial."

[2] Paragraph ten of plaintiff's complaint specifies as follows:

> Defendants breached these duties by failing to provide a safe apartment and complex and/or taking steps necessary to protect plaintiff from known dangers, including, but not limited to, the following: Installing poorly secured basement windows that could not be locked or did not lock adequately and that were easily opened from the outside; failing to adequately repair and secure the window used by said intruder when the landlord performed work on this window prior to the assault; failing to respond to tenant complaints about the inadequacy of and unsafe condition of the basement windows at the complex; failing to provide adequate lighting, security, and/or patrol of the premises after the landlord was on notice of a high incidence of criminal activity in the area.

the furnace, things like that." To the extent that plaintiff's complaint also contains broad allegations that defendants failed "to keep the apartment in adequate repair," this language does not warrant plaintiff's introduction of evidence unrelated to the clear focus of plaintiff's complaint, defendants' alleged failure to prevent

the breaking and entering of her apartment. Nor did defense counsel's opening argument statements that "you will be convinced by the end of this litigation that Danbury Park cares for the well-being of its tenants," and that "the people that run this complex and that own this complex, care about how the complex is run," invite the entirety of the HUD documents and alleged repair deficiencies subsequently introduced. It was error to admit this irrelevant information concerning DPM maintenance. *Detroit/Wayne Co, supra*.

Even assuming that one logically could infer from defendants' alleged failure to repair sinks and refrigerators that defendants also must have failed to adequately secure the premises against the dangers posed by outside intruders, the parade of alleged maintenance deficiencies created a risk of confusing the jury, by shifting its focus from defendants' alleged failure to secure the premises to other alleged generally bad behavior of defendants, that substantially outweighed any probative value arising from the alleged maintenance deficiencies. MRE 403.

To the extent that the HUD documents reference problems with broken windows and exterior lighting, this information may have related to plaintiff's claims, assuming a landlord's liability for third parties' random acts of criminal behavior, which liability I do not assume.[3]

B

During the testimony of Catherine Murphy, executive vice president of Associated Management Companies, an "umbrella management company overseeing several separate apartment complexes and their individual management units, including DPM, the trial court admitted into evidence five HUD

[3] The mere existence of a landlord-tenant relationship does not impose on the landlord any duty to protect the tenant from third parties' criminal activities. *Samson v Saginaw Pro Bldg, Inc*, 393 Mich 393, 407, 413; 224 NW2d 843 (1975); 43 ALR 5th 207, § 3, pp 253-257. Michigan courts have recognized the principle that "[a] landlord . . . has the duty to protect tenants from foreseeable criminal activities of third parties in the common areas of the landlord's premises." *Holland v Liedel*, 197 Mich App 60, 62; 494 NW2d 772 (1992). No published Michigan case has squarely addressed to what extent the landlord owes a duty to protect a residential tenant from a third party's criminal entry of the tenant's apartment. See *Samson*, *supra* at 407 ("Whether or not the landlord retains any responsibility for actions which occur within the confines of the now leased premises is not now before this Court and need not be answered. The Court further noted that "[i]t would appear, however, that [the landlord] would not retain any responsibility for such actions except in the most unusual circumstances."). Accepting as true, however, plaintiff's allegations regarding defendants' knowing disregard of a foreseeably dangerous condition, I observe that sufficiently unusual circumstances may have existed to warrant submitting the issue of defendants' negligence to the jury.

documents, one of which was previously introduced during Diesenroth's testimony and four of which represented newly introduced documents. Defendants contested the relevance of these documents. Two of these exhibits qualify as irrelevant because HUD prepared them during the year after plaintiff's break in. To the extent that the remaining three HUD documents also concerned alleged maintenance deficiencies not related to the security of DPM tenants' windows and exterior lighting,[4] again no justification supported their admission.

II

Defendants also challenged the trial court's decision to permit Richard Witte to testify concerning early 1970's statements made by DPM's maintenance employees. During parts of 1970, 1971 and 1972, Witte worked for Globe Development, which performed DPM's lawn maintenance. Witte explained that during these time periods he also had acted as an advisor to DPM's maintenance personnel. Over defendants' relevance objection, Witte recalled acquiring knowledge of wooden security devices that some DPM residents apparently placed in their basement windows. Over defendants' hearsay objection, Witte recounted some unspecified DPM maintenance employee informing him that "we were instructed to hand this [drawing of the wooden security device] out to anyone who complained that they couldn't secure their basement windows," and that "we're not allowed to build the device ourselves. The tenants have to do it."

With respect to Witte's recitations of the DPM employees' statements, these qualify as hearsay. The statements fell within the hearsay definition provided by MRE 801(c), constituting "statement[s], other than one[s] made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, I cannot agree with my colleagues' findings that the statements represent nonhearsay pursuant to MRE 801(d)(2)(D). Subrule (d)(2)(D) provides that a statement which would otherwise qualify as hearsay does not when it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." While the record does support the observation that "a continuing general partnership known as DPM existed since the 1970's," this observation ignores the fact that this entity's ownership was reorganized. The trial testimony of Catherine Murphy indicated that defendant Dennis Varian purchased DPM in 1984. The original general partnership that managed DPM, formed in 1970, was officially discontinued in 1984, when Varian obtained his ownership interest. Varian and at least one partner involved in the 1970 partnership subsequently formed a new, reorganized partnership, in which Varian assumed entirely the active management of DPM, with any original partnership members remaining as silent, limited partners. Because the instant defendants had no involvement with any DPM management activities prior to 1984, the statements of 1970-1972 DPM maintenance personnel cannot represent admissions chargeable to the instant defendants. No employment or agency relationship

[4] Though, as mentioned above, none of these documents was provided for this Court's review, Catherine Murphy testified that none of these HUD documents addressed security problems regarding windows. Within the available record, no indication exists that these three HUD documents discussed exterior lighting.

existed between the 1970-1972 DPM maintenance employees and the instant defendants pursuant to which the instant defendants could have invested the 1970-1972 DPM employees with authority to speak on the instant defendants' behalf. *Fassihi v St Mary Hosp of Livonia*, 121 Mich App 11, 14; 328 NW2d 132 (1982); *Przeradski v Rexnord, Inc*, 119 Mich App 500, 504; 326 NW2d 541 (1982), remanded on other grounds 417 Mich 1100.19; 338 NW2d 188 (1983). I therefore conclude that the trial court abused its discretion in permitting Witte to testify concerning the 1970-1972 DPM maintenance employees' hearsay statements.

III

Defendants at trial additionally challenged the court's acceptance of further testimony of Diesenroth concerning certain past events. Over defendants' relevance objection, Diesenroth recalled that in the late 1970's, after someone apparently had broken into his apartment through a first floor kitchen window, he installed a wooden brace on his basement windows. Over defendants' hearsay objection, Diesenroth explained that a DPM maintenance man had informed Diesenroth that he ought to secure his basement windows because their security level was otherwise inadequate. To the extent that Diesenroth testified regarding the unidentified maintenance man's statements, this testimony constituted hearsay. MRE 801. The maintenance man allegedly made these statements prior to the instant defendants' involvement with DPM, and, as discussed above, no agency or employment relationship existed between defendants and the maintenance man.

Furthermore, Diesenroth's testimony concerning events that occurred between ten and fifteen years before the instant plaintiff's 1992 break in was irrelevant and therefore inadmissible. MRE 401, 402. See also *Freed v Simon*, 370 Mich 473, 475; 122 NW2d 813 (1963) (Evidence of prior accidents is admissible to show a defendant's notice or knowledge of the defective or dangerous condition "[s]ubject to the general requirements of similarity of conditions, reasonable proximity in time, and avoidance of confusion of issues."); *Maerz v United States Steel Corp*, 116 Mich App 710, 723; 323 NW2d 524 (1982). While the dissent finds Diesenroth's testimony acceptable because "there was no testimony to contradict the conclusion that the same basement windows that existed in the 1970's were still in place in the 1990's," plaintiff did not solicit testimony that the basement windows' conditions in the late 1970's and at the time of plaintiff's attack were similar.[5] *Berry v Fruehauf Trailer Co*, 371 Mich 428, 430; 124 NW2d 290 (1963); *Branch v Klatt*, 173 Mich 31, 35; 138 NW 263 (1912). Moreover, the break in of Diesenroth's apartment and the alleged condition of his basement windows in the late 1970's occurred so remotely in time that any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to the instant defendants, who had no involvement in DPM's management at the time these events occurred. MRE 403; *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 201; 555 NW2d 733 (1996) (MRE 403 embodies the concept that marginally probative evidence will be given undue weight by a jury.).

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[5] "[T]he principle that the proponent of evidence bears the burden of establishing relevance and admissibility is a matter of basic hornbook law." *People v Crawford*, 458 Mich 376, 386, n 6; 582 NW2d 785 (1998).

IV

The trial court also erred in admitting evidence of defendants' subsequent remedial measures. On several occasions during the trial, plaintiff's counsel referred to defendants' installation of a wooden security device blocking plaintiff's basement window, which installation occurred after the September 1992 criminal entry into plaintiff's apartment. Plaintiff's counsel first referenced during his opening statement the post-break in installation of the wooden security device, showing the jury a model of this device. Plaintiff herself likewise identified the device and testified that after the break in defendants installed it inside her basement window. During his examination of Catherine Murphy, plaintiff's counsel introduced three work orders dated after the break in that reflected defendants' efforts to secure basement windows, apparently by utilizing the same wooden devices. Defendant objected in each instance on the basis that the proffered evidence constituted improper evidence of subsequent remedial measures.

MRE 407 generally prohibits evidence of subsequent remedial measures as follows:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

While the evidence of defendants' installation of wooden security devices clearly illustrates measures taken that, "if taken previously would have made [plaintiff's break in] less likely to occur,"[6] the trial court determined that the evidence was admissible to rebut defendants' claims or insinuations that installation of the devices was not feasible and that defendants had no notice of the basement windows' allegedly dangerous condition. Plaintiff further argues on appeal that evidence concerning defendants' post-break in installation of the wooden security devices controverted defendants' claims that they did not control the basement windows.

A review of the record fails to reveal any proper purpose for which to admit the evidence. The fact that defendants, after plaintiff's break in and other tenant complaints, subsequently installed window security devices simply does not implicate whether defendants had some knowledge prior to plaintiff's break in that the basement windows could be utilized for illegal entry. Thus, the subsequent remedial measures are irrelevant to defendants' knowledge of an allegedly existing, dangerous condition. Second, the record does not reflect that defendants challenged the feasibility of installing the wooden

[6] The fact that a precautionary measure, taken after some specific event, existed before the occurrence of the event does not preclude its status as a subsequent remedial measure. MRE 407 contemplates merely that the measure, whatever it may be, was taken after the occurrence of the event, in response to the event. Thus, subsequent remedial measures under MRE 407 are not limited to "*new* safety measures," as the dissent implies.

security devices. Plaintiff cites Catherine Murphy's statements that defendants did not install the security devices in every apartment on the basis of their determinations that an adult could not likely enter through the narrow basement windows and that blocking the basement windows would prevent escape during an emergency. Because Murphy never in any way challenged the feasibility of wooden security device installation, but merely explained the considerations that entered into defendants' determination not to utilize the devices,[7] introduction of the evidence was likewise improper for this alleged purpose. Lastly, while defendants challenged the concept of their legal control over the basement windows and any corresponding legal duty to protect plaintiff by securing the basement windows, defendants did not at trial deny making repairs throughout DPM, including repairs of basement windows.

Because no proper basis supported the admission of the subsequent remedial measures, the exclusive effect of this evidence was its tendency to establish defendants' negligence for not sooner installing the wooden security devices. The admission of the evidence contravened the clear intent and purpose of MRE 407 "to encourage, or at least not to discourage, people from taking steps in furtherance of added safety." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 189; 600 NW2d 129 (1999). The admission of this improper evidence implying defendants' negligence prejudiced defendants and adversely affected defendants' substantial rights, MRE 103; *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998). The trial court's limiting instruction was not sufficient to cure the prejudice arising from the admission of this evidence and preserve for defendants a fair trial, *Ilins v Burns*, 388 Mich 504, 510-511; 201 NW2d 624 (1972), especially when the prejudicial subsequent remedial measures evidence is considered together with the trial court's improper admission of other hearsay and irrelevant evidence.

While an incorrect evidentiary ruling ordinarily does not warrant reversal of a verdict or judgment, in this case the cumulative effect of the trial court's several errors tainted the outcome of the trial. *Jack Loeks Theatres, Inc v City of Kentwood*, 189 Mich App 603, 614; 474 NW2d 140 (1991), reversed in part on other grounds 439 Mich 968; 483 NW2d 365 (1992).

Reversed and remanded for a new trial. We do not retain jurisdiction.

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[7] Defendants attempted to elicit Catherine Murphy's testimony that a township building inspector had advised her against barricading the apartments' basement windows. The trial court accepted plaintiff's argument that this testimony constituted hearsay, however, and precluded Murphy's testimony to this effect. While defendants incorrectly argued before the trial court and before this Court that the testimony was admissible pursuant to MRE 803(1) as a present sense impression, the trial court nonetheless erred in excluding the proffered testimony. It was not offered to prove the truth of the matter asserted. It was properly admissible to show that the building inspector made the statement, and to illustrate how the statement affected defendants, specifically that defendants relied in part on the statement in determining whether to barricade basement windows. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989); *People v Eggleston*, 148 Mich App 494, 501-502; 384 NW2d 811 (1986).

/s/ Hilda R. Gage