STATE OF MICHIGAN

COURT OF APPEALS

DAVID SMITH, Personal Representative of the Estate of JOSEPH SMITH, Deceased,

Plaintiff-Appellant,

v

ROBERT'S BALFOUR CO-OPERATIVE, INC.,

Defendant-Appellee,

and

HILTON SEABROOKS, CHRISTINE SEABROOKS, KAREL LAMONT SEABROOKS, CHARLENE SEABROOKS, and DAVID OTLOWSKI,

Defendants.

UNPUBLISHED
June 22, 2001

No. 219447
Wayne Circuit Court
LC No. 98-803904-NO

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendant Robert's Balfour Co-Operative, Inc., under MCR 2.116(C)(10) in this case alleging premises liability and public nuisance.[1] We affirm.

Defendant corporation is a cooperative association that owns a twelve-unit apartment building in Detroit known as Robert's Balfour Apartments. The underlying incidents occurred in one of the privately owned cooperative units. Plaintiff's decedent, Joseph Smith, was shot by sixteen-year-old former defendant Karel Seabrooks in cooperative unit number six, which was owned and occupied by former defendant David Otlowski. Both Smith and Seabrooks were

[1] The parties stipulated to dismiss Hilton and Christine Seabrooks after this appeal was filed. This Court entered an order to that effect on January 4, 2000. The remaining defendants are not parties to this appeal.

invited guests of Otlowski's at the time of the shooting. Smith died days later as a result of the shooting. The use of the cooperative units was subject to an occupancy agreement under which the cooperative's shareholders were prohibited from engaging in or permitting illegal activity in their units. The occupancy agreement authorized defendant's Board of Directors to repossess any dwelling unit violating the agreement, with thirty days' notice.

Plaintiff asserts that defendant owed a duty to its tenants and invitees to protect against the criminal acts of third persons. Plaintiff argues that Otlowski's co-op unit was frequently used for the consumption and possible sale of illegal drugs, and that defendant should have expelled Otlowski from the co-operative before the shooting occurred in July 1996.

To establish negligence, a plaintiff must prove that the defendant owed him a duty, a breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The existence of a duty is ordinarily a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The general rule is that, absent a special relationship, "there is no duty that obligates one person to aid or protect another." *Williams v Cunningham Drug Stores Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). Such special relationships include landlord-tenant, and a cooperative association owes the same duties as a landlord to those who come on the premises. *Stanley v Town Square Cooperative*, 203 Mich App 143, 146, 148; 512 NW2d 51 (1993). A landlord/cooperative has a "duty to use reasonable precautions to protect tenants and their guests from foreseeable criminal activities in common areas inside the structures they control." *Id*. Another exception to the general rule of nonliability for the criminal acts of third parties is where the defendant actually harbors criminal activity and profits from that activity. See *Wagner v Regency Inn Corp*, 186 Mich App 158, 162-163; 463 NW2d 450 (1990), discussed *infra*.

Plaintiff also alleged that defendant created or maintained a public nuisance. "A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). These rights include the right to public health, safety, morals, peace, comfort, and convenience in travel. *Bronson v Oscoda Twp (On Second Remand)*, 188 Mich App 679, 684; 470 NW2d 688 (1991). An interference with public rights is unreasonable if it (1) significantly interferes with health, safety, peace, comfort, or convenience, (2) is a violation of a statute, ordinance, or regulation, or (3) is either continuous or produces long-term effects and the actor has reason to know that it has a significant effect. *Cloverleaf, supra* at 190; *Bronson, supra* at 684-685.

To maintain a cause of action for a public nuisance, a private citizen must demonstrate that he suffered a harm different from that of the general public. *Cloverleaf, supra* at 190. "In general, even though a nuisance may exist, not all actors are liable for the damages stemming from the condition." *Id.* at 191, citing 4 Restatement Torts, 2d § 834, p 149. "A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (2) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise." *Cloverleaf, supra* at 191. In *Wagner, supra* at 163-164, this Court noted:

> The possessor of land upon which the third person conducts an activity that causes a nuisance is subject to liability if: (1) he knows or has reason to know that the

> activity is being conducted and that it causes or involves an unreasonable risk of causing the nuisance, and (2) he consents to the activity or fails to exercise reasonable care to prevent the nuisance." [*Id.*, citing 4 Restatements Torts, 2d § 838, p 157.]

Plaintiff argues that defendant's Board of Directors was aware, or should have been aware of the criminal activity occurring on the premises and that the Board alone had the power to remedy it. The deposition testimony of two of the three[2] members of defendant's Board of Directors was submitted below, both of whom owned but did not live in co-op units in the building at the time of the shooting. The two Directors testified that they had suspected illegal activity in Otlowski's unit because of frequent visitors to the unit, and that they had contacted the Detroit police and several other law enforcement agencies a number of times, beginning in approximately late 1995, but that the police took no action until almost a year later, after the instant shooting. Plaintiff submitted below the affidavit of Daniel Kennedy, Ph.D., a University of Detroit professor retained to render an expert opinion regarding "crime prevention and analysis and as to liability of the respective defendants," in which Dr. Kennedy stated that from his review of the depositions and other documents, the alleged contacts by defendant's Board of Directors to the Detroit Police "were insufficient and therefore not reasonable in light of the magnitude of the risk to their tenants and tenants' invitees." Defendant responded by arguing that the affidavit was incompetent and irrelevant.

Also submitted below was the deposition testimony of Seabrooks, the shooter, who testified he had known Otlowski for years and had resided with Otlowski. Seabrooks testified that he did not see drugs being sold from Otlowski's coop unit, but that he had seen plaintiff's decedent, and others, in Otlowski's unit consuming drugs frequently.

The circuit court granted defendant summary disposition under MCR 2.116(C)(10), concluding:

> The parties have cited no case that imposes liability on a landlord for behavior, as opposed to the condition of the premises, that takes place within private residential quarters which, as in the case at bar, have been demised to the exclusive possession and control of a tenant. . . .
>
> Plaintiff cites *Wagner v Regency Inn Corporation*, 186 Mich App 158 (1990), as an instance where a landlord was held liable for activity occurring in an area that was under the exclusive control of a tenant. The relevant areas that were under the control of the tenant Americar in *Wagner*, however, were the lobby and parking lot of a motel. Whatever the lease agreements were between the landlord and Americar, those areas are ordinarily considered common areas of the premises; they were in fact open to the public, and the injured party was in fact a member of the general public who was injured in the public area.

---

[2] The record indicates that the third Director died in late 1996.

While the facts of *Goldsworthy v McCausland,* 187 Mich App 253 (1991), are not precisely the same as those in the case at bar, it was one which, as here, sought to impose liability on a landlord for injury to an invitee of its lessor tenant. In affirming summary disposition in favor of the landlord the court said, at p. 254:

> Plaintiff claims that the McCauslands knew or should have known of an ongoing pattern of violence on the leased property, but negligently failed to take any action to correct the problem. However, we agree with the trial court that on the basis of *Williams v Detroit,* 127 Mich App 464; 339 NW2d 215 (1983), the McCauslands, as landlords, had no duty to provide security services of their own on the leased premises. There are no common areas over which the McCauslands may have had a "slight" duty to investigate possible dangerous conditions and take preventive measures. See *Williams v Cunningham Drug Stores, Inc.,* 429 Mich 495, 502, n 17; 418 NW2d 381 (1988) (distinguishing *Samson v Saginaw Professional Building, Inc.,* 393 Mich 393; 224 NW2d 843 [1975]).

Besides the fact that *Wagner* involved common areas open to the public, there is another stark difference between that case and the allegations in this one. In *Wagner,* the majority of the panel concluded that the principle of *Williams v Cunningham Drug Store, Inc.,* 429 Mich 495 (1988), did not necessarily bar recovery because the plaintiff had adduced facts sufficient to constitute nuisance per se and nuisance in fact, both negligent and intentional. It is instructive to note those facts:

> Stolen cars, shootings, and calls to the police were almost daily occurrences. Prostitutes maintained rooms in the hotel on a daily basis. Drug trafficking was a constant problem with Young Boys, Ins., a notorious drug trafficking gang, renting entire floors of the hotel from which to run their operations. Breakings and enterings, assaults, armed robberies, and car thefts were frequent occurrences on the premises. A fire bombing once "took out" an entire floor of the hotel. *Wagner, supra,* p. 165.

In the case at bar the offending behavior is multiple visits of callers that created a suspicion that drugs were dispensed and used within a single apartment. Regardless of any dispute regarding the sufficiency of defendant's attempts to get relief from the authorities, nothing alleged comes close to resembling the scenario that was deemed sufficient to constitute a public nuisance in *Wagner*. There, the physical danger to the general public was manifest. The allegations in the case at bar, on the other hand, did not give notice of a single instance of assaultive behavior by anyone.

> Another factor that contributed to the result in *Wagner*, according to the court (p. 166), and also nonexistent here, was that the defendants derived substantial income from the illegal activities.
>
> As far as the potential for danger to those who visited the Otlowski apartment, the only person involved in this litigation, besides the co-defendants, who had better knowledge about that than the landlord was plaintiff's decedent himself, a frequent visitor to the apartment who used drugs there. To fully understand the incongruity of the claim made here, all we need to do is imagine that Joseph Smith had survived the assault and had started suit for his injuries, in which case he would be claiming that the landlord should have protected him from the denizens of the Otlowski apartment, i.e., from himself and other[s] like him. Indeed, it should seem obnoxious that the landlord, who at best had only suspicions about the activity at the apartment, should be charged with liability for not acting effectively enough in making reports to the authorities when Mr. Smith, who had perfect knowledge of the activities, never reported them himself. To be sure, he was committed to *hiding* them from the police. The personal representative of Mr. Smith's estate has no better claim than he would have had himself.
>
> If the foregoing is an application of the Wrongful Conduct rule cited by the defendant, then it seems to apply. In the end, however, the merit of the motion for summary disposition does not depend on the application of that principle because, under the facts alleged, the landlord had no applicable duty regarding that portion of the premises where the offending behavior took place.

We agree with the circuit court's determination and analysis. Because the harm occurred inside Otlowski's privately owned cooperative unit, defendant did not owe plaintiff's decedent a duty to prevent the shooting. *Bryant v Brannen*, 180 Mich App 87, 97; 446 NW2d 847 (1989); *Goldsworthy v McCausland*, 187 Mich App 253, 254; 466 NW2d 286 (1991).[3] Moreover, it is questionable whether the shooting was proximately caused by the failure to evict Otlowski in the face of the suspicion of drug activity. Plaintiff's public nuisance claim also fails; it is not supported by *Wagner, supra*, given that case's vast factual differences from the instant case.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Jeffrey G. Collins

[3] We agree with the circuit court that it is unnecessary to reach the wrongful conduct issue.