STATE OF MICHIGAN

COURT OF APPEALS

JOSE ORTIZ and MELISSA MOORE, Co-Personal Representative of the Estates of JOSE ORTIZ-MOORE and SAVANAH M. MOORE,

Plaintiff-Appellants,

v

CHARLES WILLIAM PORTER and CITY OF GRAND RAPIDS,

Defendant-Appellees.

UNPUBLISHED
November 30, 2001

No. 226466
Kent Circuit Court
LC No. 98-012463-NO

Before: Griffin, P.J., and Gage and Meter, JJ.

METER, J. (*concurring*).

I concur in Judge Gage's lead opinion regarding the applicability of the public duty doctrine to this case. See *Beaudrie v Henderson*, 465 Mich 124; 631 NW2d 308 (2001). I also concur that the grant of summary disposition by the trial court should be affirmed, albeit on grounds other than proximate cause. With regard to the proximate cause issue, I agree with the reasoning set forth by Judge Griffin in his separate opinion.

In my view, the trial court correctly granted summary disposition on the alternative basis that defendant Porter owed plaintiffs no duty because of the rule set forth in *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997), that "an individual has no duty to protect another who is endangered by a third party's conduct."

In concluding that Porter owed plaintiffs no duty of protection, the trial court initially observed that it was the landlord's conduct rather than Porter's conduct that primarily endangered plaintiffs' decedents. The court then examined the record to determine if the facts of the case fit within an exception under the *Murdock* rule. The court recognized the exception under *Murdock* that if an injured party entrusts himself to the protection and control of another and thereby loses the ability to protect himself, a special relationship may exist that warrants the creation of a duty. See *id.* at 54. The court essentially found that plaintiffs and their decedents did not surrender control to Porter and thus concluded that Porter owed plaintiffs no duty. I find no error with regard to this ruling.

As noted, *Murdock* states that a person generally "has no duty to protect another who is endangered by a third person's conduct." *Id.* Such a duty arises only if a "special relationship"

exists between the defendant and the victim or the immediate tortfeasor. *Id.* The *Murdock* Court noted that "a special relationship would exist if the plaintiff had entrusted himself to the protection and control of [the] defendant and, in so doing, lost the ability to protect himself." *Id*. In *Krass v Tri-County Security*, 233 Mich App 661, 670; NW2d (1999), the Court cited the following from *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988), a case on which the *Murdock* Court relied:

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.

Here, it is indisputable that plaintiffs did not entrust themselves to the protection allegedly offered by Porter *with a consequent loss of control to protect themselves*. The situation in this case simply does not compare to situations in which a hotel guest entrusts himself to the innkeeper or an airline passenger entrusts himself to the carrier. See *Krass, supra* at 670. Indeed, there was no genuine factual dispute that the instant plaintiffs were able to take steps to provide for themselves the protection that Porter allegedly offered. Accordingly, no "special relationship" existed between plaintiffs and Porter, and the claim, in my opinion, was barred by *Murdock*.

In arguing against the trial court's use of *Murdock* to dismiss their claim, plaintiffs rely heavily on the alleged fact that Porter promised to provide plaintiff Moore and her family with a smoke detector for their protection. Citing the Restatement of Torts, 2d, §323, plaintiffs argue that this promise rendered it unnecessary for plaintiffs to establish that they had a special relationship with Porter, because Porter voluntarily undertook to protect them and therefore was obligated to do so properly. I do not find plaintiff's argument convincing. Indeed, neither *Murdock* nor *Krass* indicated that the existence of a promise would eliminate the requirement of a "special relationship," and I conclude that the *Murdock* rule properly takes precedence over the "voluntary assumption of duty" doctrine cited by plaintiffs.

Moreover, and significantly, even though plaintiffs contend that their claim was valid because Porter voluntarily undertook to protect them, they do not cite any persuasive authority or make a reasoned argument for the proposition that the "voluntary assumption of duty" doctrine supersedes the general rule and exception regarding third-party acts as set forth in *Murdock*.[1] Accordingly, plaintiffs have essentially abandoned this argument for appeal. See *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998).

I concur in the decision to affirm.

/s/ Patrick M. Meter

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[1] Indeed, the two cases that plaintiff cites, *Schanz v New Hampshire Ins Co*, 165 Mich App 395; 418 NW2d 478 (1988), and *Smith v Allendale Mutual Ins. Co.*, 410 Mich 685; 303 NW2d 702 (1981), do not address the interplay of the *Murdock* general rule and the "voluntary assumption of duty" rule discussed in the Restatement.