NO. 101768-5
[Court of Appeals No. 38449-7-III]

SUPREME COURT OF THE STATE OF WASHINGTON

ALETA BRADY,

Petitioner/Plaintiff.

v.

WHITEWATER CREEK, INC., a foreign corporation;
SUMMIT RIDGE, LLC, a Washington corporation,

Respondents/Defendants,

RESPONSE TO PLAINTIFF'S PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Despite prevailing on appeal, Plaintiff Aleta Brady petitions for review of the Court of Appeals' rejection of her expansive and incorrect application of the dangerous propensities test for foreseeability. Brady contends the Court erred in applying the prior similar incidents test and should instead have applied a "general field of danger" analysis to determine that Whitewater Creek, Inc. and Summit Ridge, LLC (collectively "Whitewater") are liable for her subsequent rape because Whitewater did not evict tenants after Ms. Brady reportedly witnessed their unauthorized guest engaged in an altercation. The court below disagreed with Brady's contention as it does not comport with Washington law and her proposed rule on a landlord's duty to evict would violate public policy. Whitewater consistently argued that Brady failed to demonstrate foreseeability giving rise to a duty under either the dangerous

propensities test or the prior similar incidents test.[1] Notably, Brady argues that the prior similar incidents test, on which the Court of Appeals reversed summary judgment dismissal by the trial court, is inapplicable to this case.

Brady's petition for review inaccurately restates the law and the findings of the Court of Appeals in order to find a conflict between prior published cases and the decision by the lower court in this case. The Court of Appeals appropriately rejected the dangerous propensities argument that Brady's report of a prior altercation involving LaJuane Roberson made it foreseeable that Roberson would scale a third-floor balcony, access an apartment through an unlocked door, and rape the tenant inside. Furthermore, the lower court appropriately denied reconsideration wherein Brady contended that the use of the word "misdemeanor" suddenly created a new rule. This

[1] Whitewater has filed a separate petition for review on the basis that the court of appeals misapplied the prior similar incidents test, thus that issue will not be addressed in this response.

argument, presented again in the petition for review, unfairly interprets the lower court's opinion. It focuses on the word "misdemeanor" without the remainder of the sentence which demonstrates the reluctance of the court to adopt a rule mandating landlords evict tenants to prevent liability for alleged criminal conduct by the tenants' guests. Considerations of public policy are necessary and appropriate when a court considers the limits of foreseeability and duty. Brady's petition for review has no basis as the lower court appropriately applied the law with respect to the dangerous propensities test consistent with other published decisions.

II. COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the Court of Appeals correctly find that, based on Washington law and public policy, a landlord's knowledge of an alleged criminal act by a tenant's guest does not require eviction of the tenant or else subject the landlord to liability for subsequent criminal acts by the guest?

III. COUNTERSTATEMENT OF THE CASE

A. Aleta Brady was a tenant at Summit Ridge, an affordable-housing apartment building in Spokane.

Summit Ridge is an affordable-housing apartment complex located on Spokane's South Hill. CP 24. It is owned by Summit Ridge, LLC, and managed by Whitewater Creek, Inc. *Id*. Appellant Aleta Brady leased a third-floor unit in Summit Ridge beginning in July 2015. Jessica Sanfilippo and her children, Curtis and Alyssia Tancredi, also resided at Summit Ridge in unit F-143 starting July 2015. CP 256, 273, 307. Beginning as early as November 2015, a friend of Curtis Tancredi, LaJuane Roberson, began periodically staying at Sanfilippo's apartment. CP 252-53. While Roberson moved out of the apartment in early 2016, he remained involved in a relationship with Alyssia Tancredi, occasionally staying at the apartment after that date. CP 273.

B. Brady reported a physical altercation involving Roberson and a young woman.

In April 2016, Brady witnessed Roberson in a physical altercation with a young female in the Summit Ridge parking lot. CP 210. Brady called 911, but there is no evidence that Roberson was charged with a crime for this incident. *Id*. Brady filed a tenant complaint form in the manager's office. *Id*. Several days later, a maintenance worker asked Brady if Roberson was the person she saw in the parking lot. *Id*. Brady responded yes. *Id*. Roberson denied assaulting a female. *Id*.

C. Another tenant reported suspicious activity by a person not matching Roberson's description.

Another Summit Ridge resident, Olga Yurkova, stated that on September 10, 2016, she saw an unidentified man, not matching Roberson's description, on the roof over the breezeway to the apartment complex's stairwell trying to access a neighbor's second-floor balcony. CP 91, 184. Yurkova called the police and notified Whitewater in the following days. CP 94, 98.

D. Roberson sexually assaulted Brady in her apartment.

On September 23, 2016, Roberson sexually assaulted Brady in her apartment. CP 4. Brady alleged that Roberson gained access to her apartment by climbing up to her third-floor balcony and entering through her unlocked sliding door. CP 4.

On September 20, 2019, Brady filed the present lawsuit alleging that Whitewater "failed to provide, maintain, and implement necessary measures to warn of the possibility of uninvited access to or to prevent uninvited access to tenants' balconies at the Summit Ridge Apartments." CP 6.

E. Trial court granted summary judgment dismissal.

On July 29, 2021, Whitewater filed a motion for summary judgment, demonstrating to the Court that Whitewater did not owe Brady a duty of protection from the unforeseeable sexual assault by Roberson. CP 105-115. Brady opposed the motion, arguing, in part, that Whitewater "permitted Plaintiff's attacker to reside on the premises" and that "[e]viction of a tenant would, of course, remove any unauthorized resident permitted by that

tenant." CP 128-29. Brady noted that Whitewater issued four notices to tenants of F-143 for lease violations due to unauthorized guests, with the first notice issued on the day of the altercation reported by Brady. CP 136-37. Brady argued that failing to remove the unauthorized and unscreened Roberson from the property constituted a breach of Whitewater's duty. CP 137. The Court granted Whitewater's motion for summary judgment. CP 365-67.

F. Brady appealed the dismissal of her case arguing Brady was within a "general field of danger" and Whitewater owed a duty because of notice of Roberson's dangerous propensities.

Brady then appealed the order of summary judgment to the Court of Appeals arguing, in part, that Whitewater owed Brady a duty because her injuries fell within a "general field of danger" that was foreseeable. Appellant's Br. at 22. Brady argued that evidence of prior similar incidents was not necessary to demonstrate foreseeability and instead relied on Whitewater's notice of an unspecified "security flaw that made upper-floor

balconies accessible" and notice of Roberson's dangerous propensities. *Appellant's Br*. at 26-28.

G. Division III rejected Brady's argument regarding a duty arising from notice of Roberson's dangerous propensities because the law requires a special relationship not present between Whitewater and Roberson.

The Court of Appeals considered Brady's "dangerous propensities" argument but found it deviated from Washington law. Relying on prior published decisions in Washington, the Court of Appeals found Whitewater had no duty to defend Brady arising from notice of Roberson's dangerous propensities because Whitewater would only have a duty to control Roberson and prevent the injuries if a special relationship (custodial or supervisory) existed between Whitewater and Roberson. *Brady v. Whitewater Creek, Inc.*, 38449-7-III, 2022 WL17420727, at *15-16 (Wash. Ct. App. Dec. 6, 2022); *(*citing *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983); *Volk v. DeMeerleer*, 187 Wn.2d 241, 262-63, 386 P.3d 254 (2016); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 200,

943 P.2d 286 (1997); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227-28, 802 P.2d 1360 (1991)). The lower court recognized that no Washington cases have applied the "dangerous propensities" exception to find a residential landlord has a duty to control its tenant from committing criminal acts on another. *Brady*, 38449-7-III, at *16.

H. Division III rejected Brady's invitation to impose an expansive duty on landlords because public policy does not favor imposing a duty to control an unauthorized tenant by eviction for allegations of misdemeanor assault.

After demonstrating Brady's argument was unsupported by existing Washington law, the Court of Appeals discussed the harmful impact of Brady's proposed rule to impose a duty on landlords to evict tenants where there is an allegation of assault. *Brady*, at *17. The court's discussion of public policy did not establish a rule rejecting all evidence of misdemeanor conduct in cases assessing foreseeability, but instead rejected Brady's argument that landlords have a duty to evict tenants for alleged assaultive conduct. *Id.*

I. Despite prevailing, Brady moved for reconsideration on the grounds that notice of Roberson's dangerous propensities created a duty and the Court of Appeals should not have considered public policy in its decision.

The Court of Appeals rejected Brady's general field of danger and dangerous propensities argument, but applied the prior similar incidents test to find Whitewater owed a duty. *Brady*, at *16. Despite the numerosity element of the test, the Court of Appeals held Yurkova's complaint was a prior similar incident and was alone sufficient to render Brady's assault foreseeable by Whitewater. *Brady*, at *25. After prevailing on appeal, Brady moved for reconsideration of the Court of Appeals' decision rejecting her dangerous propensities and general field of danger argument. The Court of Appeals denied Brady's motion for reconsideration.

On March 2, 2023, Brady petitioned this Court for discretionary review, forwarding similar arguments to those raised in the motion for reconsideration. Whitewater petitioned this Court, seeking discretionary review on the lower court's

abandonment of the numerosity element of the prior similar incidents test.

IV. ARGUMENT

A. Discretionary review is not warranted under RAP 13.4(b)(1) or (2).

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals...

RAP 13.4(b). Here, Brady seeks review of issues but the *Brady* court decided those issues in conformance with prior published decisions of the Court of Appeals.

B. The Court of Appeals faithfully applied Washington law by finding notice of Roberson's dangerous propensities did not create a duty where no special relationship existed between Whitewater and Roberson as required to impose a duty on Whitewater to control Roberson.

Washington Courts are reluctant to place the burden of third parties' criminal conduct on a business. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 766, 344 P.3d 661 (2015); *Brady*, at *19. "The general rule at common law is that a private

person does not have a duty to protect others from the criminal acts of third parties." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991). "[T]here is usually no duty to prevent a third party from causing physical injury to another, unless 'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct."' *Hutchins*, 116 Wn.2d at 227.

In those rare instances where a person has a duty to control the conduct of third persons to prevent harm to others, the standards are set forth in the *Restatement (Second) of Torts* § 315. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275-76, 979 P.2d 400 (1999). *Restatement* § 315 provides:

> There is no duty so to control the conduct of a third person as to prevent them from causing physical harm to another unless:
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Hertog, 138 Wn.2d at 276, quoting *Restatement (Second) of Torts* § 315 (1965). "A duty will be imposed under Section 315 only where there is a 'definite, established and continuing relationship between the defendant and the third party."' *Hertog*, 138 Wn.2d at 276, quoting *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992).

The opinion of the Court of Appeals correctly applied the rule as stated in *Restatement* § 315, finding Whitewater would only have had a duty to control Roberson's conduct if a special relationship existed between Whitewater and Roberson. *Brady*, at *15. As noted in the opinion below, these special relationships include parent and child, employer and employee, possessor of land and their licensee,[2] one who takes charge or supervises a person with known dangerous propensities, and psychiatrists and

[2] The Court of Appeals decision discusses *Restatement (Second) of Torts* § 318 which addresses the special relationship between a landowner and licensee, finding there are no "Washington cases that have applied this exception to find that a residential landlord has a duty to control its tenant so as to prevent the tenant from committing criminal acts on another."

their clients. *Brady*, at *16. Whitewater and Roberson did not have a special relationship and thus notice of Roberson's prior alleged assault is insufficient to impose a duty on Whitewater to protect others from Roberson's conduct. The lower court did find there was a special relationship between Whitewater and Brady, which gave rise to a duty to protect from criminal conduct that was foreseeable based on prior similar incidents.

Brady improperly applies the term "general field of danger" to argue a broad duty applies where a party has notice of the dangerous propensities of another. Brady argues in the petition that "[w]hen foreseeability is premised on notice of a third party's dangerous propensities, Washington courts employ the usual 'general field of danger' inquiry." *Petition for Review*, at 13 (March 2, 2023) (citing *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, 252 P.3d 914, 919-20 (2011).

Contrary to Brady's argument, the term "general field of danger" is used in prior cases to explain the relationship between

foreseeability and duty. *E.g., J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57, 871 P.2d 1106, 1111 (1994) ("In order to establish foreseeability, the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant."); *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, 252 P.3d 914, 919 (2011) ("The harm must be reasonably perceived as within the general field of danger that should have been anticipated."). The "general field of danger" applies to foreseeability determinations generally and is not specific to situations involving persons with known dangerous propensities. As discussed above, known dangerous propensities are insufficient to establish a duty in the absence of a special relationship.

C. The Court of Appeals properly considered the public policy concerns from imposing a duty on landlords to control unauthorized tenants by eviction for allegations of misdemeanor assault.

Brady's petition mischaracterizes the opinion of the lower court as creating a "rule precluding consideration of conduct

amounting to a misdemeanor." *Petition for Review*, at 25. The opinion did not create such a rule. Instead, the lower court addressed policy considerations raised in Whitewater's briefing. Specifically, Brady has maintained that Whitewater breached a duty of care by failing to evict the tenants of F-143 based on Roberson's conduct. Whitewater argued that it was under no duty to evict the tenants of F-143 and that such a duty would have broad implications for landlords and tenants across the state of Washington. The Court of Appeals agreed with Whitewater on this point and noted that "public policy does not favor imposing a duty on a landlord to control its unauthorized tenant by evicting him for one allegation of misdemeanor assault." *Brady*, at *17. This consideration of public policy is not an evidentiary ruling, an attempt to distinguish felonies from misdemeanors, and does not purport to create a strict rule, but instead is a rejection of the duty Brady proposed in this case.

It was wholly appropriate for the Court of Appeals to consider public policy in deciding the limits and extent of the

duty owed in this case. "The existence of a legal duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (quotation marks omitted) (quoting *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001)). "The existence of a legal duty is a question of law for the court." *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015).

Brady's alleged concerns are unfounded as the lower court did not create a new rule limiting consideration of uncharged or misdemeanor conduct in foreseeability analysis. The consideration of public policy is in agreement with prior published decisions and thus does not warrant discretionary review.

V. CONCLUSION

This Court should deny review of the issues raised in Plaintiff Aleta Brady's Petition for Review.

VI. CERTIFICATE OF COMPLIANCE

This document contains 3548 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 31st day of March 2023.

KIRKPATRICK & STARTZEL, P.S.

By: /s/ *Luke O'Bannan*

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CERTIFICATE OF SERVICE

I certify that on March 31, 2023, I caused to be served in the manner noted below a copy of the foregoing on the following individuals:

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s/Luke O'Bannan
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KIRKPATRICK & STARTZEL, P.S.

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