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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LUCY CELES, Petitioner, v. LONE PINE APARTMENTS, LLC; TARGA REAL ESTATE SERVICES, INC.; METROPOLITAN DEVELOPMENT COUNCIL, Respondents.	No. 78788-8-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — This court granted Lucy Celes's request for discretionary review of the trial court's summary judgment order dismissing her negligence claim against Lone Pine Apartments, LLC and Targa Real Estate Services, Inc., based on her injuries caused by a fire intentionally set by her neighbor's visitor. Celes contends that Lone Pine and Targa breached their duty to exercise reasonable care to protect her from third party criminal conduct. Because Celes has demonstrated a genuine issue of material fact, we reverse and remand for further proceedings consistent with this opinion.

FACTS

Lucy Celes leased Unit 4, a second floor apartment in the Lone Pine Apartments, owned by Lone Pine and managed by Targa. Lone Pine participated in the City of Lakewood's "Crime Free Multi-Housing Program." To remain in that program, Lone Pine could not rent to felons or people with drug convictions.

When Lone Pine purchased the building, the Metropolitan Development Council (MDC) leased three apartment units in it, including Unit 2. MDC subleased these three units to low income and formerly homeless people. Unit 2 was across the stairwell from Unit 4. MDC, not Targa, ran background checks on the potential tenants for apartments they leased from Lone Pine.

Tyronda Bermudez subleased apartment unit number 2. Her boyfriend, Linwood Smith, who was not a party to the sublease, lived there and sold drugs from the unit. Both Bermudez and Smith had multiple prior felony convictions including drug-related convictions.

Lone Pine and Targa had notice that Linwood Smith lived in Unit 2 and sold drugs there. Celes and other tenants told the property manager, Michelle Riles, they were suspicious of the drug activity coming from Unit 2. Ignacio Agbanlog, the maintenance man, also suspected Unit 2's drug activity and said he and the tenants reported suspected drug activity to Riles.

In June 2014, Celes heard gunshots from Unit 2. She called Riles and 911. Police came and took pictures. Police responded to Unit 2 for a report of domestic violence on at least one other occasion when Smith threatened Bermudez with a knife.

On September 5, 2014, the residents of Unit 2 argued with a visitor, Roger Faleafine. Neighbors heard Faleafine yell, "I'll be back[,] I got you!"

The next morning, Faleafine returned and intentionally set fire to the common stairwell between Unit 2 and Celes's apartment. Celes woke up to the fire outside her apartment door. She never heard a fire alarm sound. The fire then entered her

apartment. To escape the fire, she jumped off her second story balcony onto the ground. She suffered serious injuries from the fire and from the fall.

Celes sued Lone Pine and Targa for negligence, breach of duties owed to Celes as a tenant/invitee, breach of implied warranty of safety and habitability, breach of the Residential Landlord-Tenant Act, and breach of contract.

Lone Pine and Targa asked the trial court for a summary judgment dismissing Celes's claims. After the trial court denied this request, they sought but were denied discretionary review. Lone Pine and Targa conducted additional discovery. They made a second request for a summary judgment dismissal. They argued, in part, that the undisputed facts did not support Celes's negligence claim, because they did not show that Lone Pine and Targa owed her a duty to protect her from arson committed by a third party.

The trial court granted a partial summary judgment dismissing Celes's negligence claim stating:

> The prior criminal acts of drug dealing are not sufficiently similar to arson.
> The prior violent act of shots fired was not sufficiently similar to arson.

At Celes' request, the trial court certified for immediate review under RAP 2.3(b)(4) the dismissal of her negligence claim for third party criminal conduct. We granted Celes request for discretionary review.

STANDARD OF REVIEW

Celes challenges an order granting partial summary judgment dismissing her claim that the respondents breached a duty to protect her from third party criminal

conduct. We review an order granting summary judgment de novo.[1] Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law."[2] We view the evidence in the light most favorable to the nonmoving party,[3] here being Celes.

ANALYSIS

Celes claims the trial court should not have dismissed her negligence claim on summary judgment because the record shows a material issue of fact about whether Lone Pine and Targa owed her a duty to protect her against harmful criminal acts by third parties. She first asserts the trial court did not use the correct test to determine whether Lone Pine and Targa owed her a duty. She also asserts that because respondents were aware of Unit 2's drug activities, they owed her a duty to protect her from third party criminal conduct.

To prevail on a negligence claim, a plaintiff must establish (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.[4]

Common law, and as a general rule, states, "a private person does not have a duty to protect others from the criminal acts of third parties."[5] An exception to this rule

[1] Loeffelholz v. University of Washington, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).
[2] CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).
[3] Loeffelholz, 175 Wn.2d at 271.
[4] Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).
[5] Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 199, 943 P.2d 286 (1997) (quoting Hutchins, 116 Wn.2d at 223).

applies when a special relationship exists between the defendant and the victim.[6] One of those special relationships exists between a landlord and a tenant.[7]

First, Celes asserts that the trial court should not have required her to present evidence of sufficiently similar prior acts of violence in order to establish the duty to protect her from criminal acts. We agree.

"Whether a duty exists is a question of law for the court."[8] In determining duty, if the parties only show prior similar violent acts in order to establish duty (e.g. prior mall shootings) a court should only focus on the prior similar incidents test.[9] But, if a party offers evidence other than prior acts of similar violence, the trial court should not use the prior similar acts test to determine the existence of a duty.[10]

The trial court limited its analysis to a similar incidents test based on a case involving a mass shooting at a shopping mall where an employee, McKown, was shot.[11] McKown sued the landowner alleging that it failed to exercise reasonable care to protect him from foreseeable criminal harm.[12] In establishing whether the landowner had a duty to protect McKown from third party criminal behavior, the court considered "evidence of six other shootings and three other gun-related incidents" at the mall.[13] Here, the court explained that when a landowner's obligation to protect business invitees from third party criminal conduct arises from past experience, the plaintiff must

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[6] Nivens, 133 Wn.2d at 200.
[7] Griffin v. West RS, Inc., 97 Wn. App. 557, 984 P.2d 1070 (1999) (reversed on other grounds).
[8] N.L. v. Bethel School District, 186 Wn.2d 422, 430, 378 P.3d 162 (2016).
[9] McKown v. Simon Property Group, Inc., 182 Wn.2d 752, 770, 344 P.3d 661 (2015).
[10] McKown, 182 Wn.2d at 770.
[11] McKown, 182 Wn.2d at 758.
[12] McKown, 182 Wn.2d at 758.
[13] McKown, 182 Wn.2d at 759-60.

show history of prior similar incidents. Because Celes's legal "argument was on landowner's past experience", the trial court applied the prior similar incident test and required Celes to show that "prior acts of violence are sufficiently similar in nature and location, sufficiently close in time, and sufficiently numerous to have put the business on notice."

The court in McKown stated that it focused on prior similar acts because that was the only theory meaningfully addressed by the parties.[14] Here, Celes did not attempt to establish a duty by only showing acts of similar violence. Instead, as acknowledged by the trial court, she presented evidence of the landlords past experience, which included criminal activity on the premises.

Celes's evidence showed that Unit 2 had visitors coming and going through the stairwell, where the fire that caused her injuries occurred, "at all hours of the day and night, often staying for just a short time." Multiple tenants and the maintenance man had informed management of Unit 2's drug activity. Lone Pine participated in the "City of Lakewood's Crime Free Multi Housing program," which required Lone Pine to refrain from renting to felons or people with drug related convictions. It also required Lone Pine to conduct background checks on tenants, which it failed to do, because MDC agreed to do the background checks. The apartment complex also had signs posted stating, "We Have Joined The: LAKEWOOD CRIME FREE MULTI-HOUSING PROGRAM Keeping Illegal Activity Out Of Rental Property."

Unit 2's drug activity and associated frequent visitors created an unsafe condition in the common areas like the stairwell. And, Lone Pine did not comply with the

[14] McKown, 182 Wn.2d at 770.

requirements of a city program for which it advertised its participation. So, Celes showed more than mere "acts of prior similar violence." Because Celes did not attempt to establish the duty by only showing acts of similar violence, the trial court should not have used the prior similar incidents test.

Celes next claims that Lone Pine and Targa owed her a duty because the criminal act causing her injuries fell within the general field of danger foreseeable because of their knowledge of Unit 2's activities and their role as the landlords.

"The residential landlord owes its tenant a duty to protect the tenant from foreseeable criminal conduct of third persons on the premises. The landlord has the affirmative duty to take reasonable steps to protect the tenant from such conduct to satisfy its duty."[15] Landlords are "entrusted with the responsibility with managing the common areas."[16]

"Foreseeability is not measured against the specific sequence of events leading to harm or against the exact harm suffered."[17] "[T]he question is whether the actual harm fell within a general field of danger which should have been anticipated."[18]

We recently examined the issue of foreseeability in determining whether a duty exists in Meyers v. Ferndale School District.[19] We noted how the trial court "incorrectly focused its foreseeability analysis on the specific injury-causing event herein" and if one

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[15] Griffin, 97 Wn. App. at 570.
[16] Faulkner v. Racquetwood Vill. Condo. Ass'n, 106 Wn. App 483, 487, 23 P.3d 1135 (2001).
[17] Meyers v. Ferndale Sch. Dist., No. 79655-1-I, slip op. at 3, 457 P.3d 483 (Wash. Ct. App. Feb. 10, 2020), http://www.courts.wa.gov/opinions/pdf/796551.pdf.
[18] Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 276, 428 P.3d 1197 (2018) (quoting McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).
[19] Meyers, slip op. No. 79655-1-I.

focused "on the more general field of danger," "there [was] a question of fact for the jury regarding whether the harm . . . was foreseeable."[20]

Here too, the harm fell into a general field of danger that respondents should have anticipated. Respondents had the duty to manage the common areas such as the stairwell.[21] The tenants of Lone Pine provided their landlord with notice of criminal activity associated with Unit 2 when they informed Riles about the drug sale suspicions and gunshots. Lone Pine also received notice when their employee Agbanlog reported Unit 2's suspected drug activity. So, Celes presented sufficient evidence to establish that criminal activity occurred in the common area outside her apartment that exposed tenants to danger. Lone Pine and Targa had a duty to protect tenants from this danger.

Lone Pine and Targa contend that the fire Faleafine set was not foreseeable and as a result they had no duty to protect Celes from it. Their argument conflates whether they had a duty and the scope of that duty. The record clearly establishes their duty to protect tenants from harm caused by ongoing criminal activity. They knew about the unsafe conditions that occurred in the common areas of their property. It was their duty to "deal with issues that arise from the landlord's control of the common areas of the premises."[22]

Their foreseeability argument raises the question of whether the fire in the stairwell outside Celes's apartment fell within the scope of their duty. "(W)hen foreseeability is a question of whether the harm is within the scope of the duty owed, it

[20] Meyers, slip op. at 4.
[21] Griffin, 97 Wn. App. at 567.
[22] Griffin, 97 Wn. App. at 570.

is a question of fact for the jury."[23] Celes demonstrated a genuine issue of fact about foreseeability by submitting evidence showing the "well-known nexus between drugs or drug trafficking and violence" and that the arson was a consequence of the drug related criminal activity that occurred at Lone Pine.

Lone Pine and Targa had a duty to protect Celes from foreseeable third party criminal conduct. The trial court should not have decided as a matter of law whether the specific harm that injured Celes fell within the scope of that duty. Celes presented sufficient evidence to make that a question for a jury to decide.

CONCLUSION

We reverse and remand for further proceedings. Celes used evidence other than similar violent acts to establish a duty, so the similar prior incidents test used in McKown does not apply here. Celes showed that respondents owed her a duty as a tenant to protect her from foreseeable third party criminal conduct.

Leach, J.

WE CONCUR:

[23] McKown, 182 Wn.2d at 764.