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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner III, Circuit Court Judge

Case No. 2019-001884

Gary L. Mole, as Personal Representative
of the Estate of Eddie Mole, Deceased Appellant,

v.

Kramer Apartments, LLC Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. THE NO DUTY RULE OF *CRAMER* APPLIES BECAUSE THE RESPONDENT'S ACTIONS DIRECTLY AND UNREASONABLY LEAD TO THE TENANT BEING HARMED.

Maurice Mitchells' access to the Eddie Mole's unit was the direct result of Kramer Apartments actions in failing to maintain a common area, the door, which it precluded Eddie Mole from altering, repairing or upgrading. (R. 63, Affidavit of Gary Mole). Kramer had exclusive control over these conditions which lead directly to Maurice Mitchell's ability to enter the premises and murder Eddie Mole. (R. 64, Affidavit of Gary Mole) Eddie Mole's door was an actionable defect, and the crime occurred at the very door Kramer Apartments refused to properly fix. (R. 63, 64, Affidavit of Gary Mole) Kramer Apartments retained not just superior ability to control this defective windowed door, it maintained sole ability, as it prevented Eddie form repairing the door. (R. 64, 82, Affidavit of Gary Mole, Exhibit F) This defective door foreseeably enhanced the risk of criminal activity. Kramer Apartments has actual knowledge of both the ease at which this defective door could be compromised as well as actual knowledge of criminal activity on the premises. (R. 64, Affidavit of Gary Mole, Exhibit A) On October 28, 2015, Maurice Mitchell, who was knowingly allowed the reside at Kramer Apartments with his girlfriend, Nadine Robinson, despite his violent and felonious history, was able to fatally wound Eddie Mole after gaining access to his apartment by breaking out the same window in the door adjacent to the lock which had been used in the prior two robberies of Eddie Mole's apartment in 2014. (R. 64, 71, 73, 76 Affidavit of Gary Mole)

Under South Carolina law, when a landlord assumes to act, even though under no obligation to do so, he becomes subject to the duty to act with due care. *See Cramer v. Balcore*

Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994). By specifically precluding Eddie Mole from making repairs, Kramer Apartments assumed the responsibility to adequately repair Mr. Mole's door, a common area, after the two robberies which preceded his death. Although not automatic by nature of the relationship, a landlord's duty may arise under particular circumstances. *Cramer I*, 312 S.C. at 443 n.1, 441 S.E.2d at 319 n.1. This duty which Kramer Apartments assumed arose by contract when it placed in the lease agreement that no repairs could be made by the tenant and struck through the written provision which would have allowed the tenant to arrange for professional assistance in the event repairs. The law states that a duty may arise by contract. *Cramer I*, 312 S.C. at 442, 441 S.E.2d at 318. A lease is a contract, and Kramer contracted with Mr. Mole to make necessary repairs by specifically precluding him from making repairs or employing professionals to do so on his behalf. Here, Kramer's actions in failing to properly repair the door which presented a foreseeable risk known by Kramer since 2012, increased the risk of Eddie Mole's injuries. Although his assailant approached him in the parking lot area, he was able to force his way into the apartment door before he brutally attacked Mr. Mole.

Maurice Mitchells' access to the Eddie Mole's unit was the direct result of Kramer Apartments actions in failing to maintain a common area, the door, which it precluded Eddie Mole from altering, repairing or upgrading. This in tandem with Kramer Apartment's allowing Maurice Mitchell to continue to live on the premises despite his extensive criminal activity both on the premises and away from the premises caused Eddie Mole to be a target for Maurice Mitchell's crimes. Kramer had exclusive control over these conditions which are lead directly to Maurice Mitchell's ability to enter the premises and murder Eddie Mole. Eddie Mole's door was an actionable defect, and the crime occurred at the very door Kramer Apartments refused to properly fix. Kramer Apartments retained not just superior ability to control this defective windowed door,

it maintained sole ability, as it prevented Eddie from repairing the door. This defective door foreseeably enhanced the risk of criminal activity. Kramer Apartments has actual knowledge of both the ease at which this defective door could be compromised as well as actual knowledge of criminal activity on the premises.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING THAT DECEDENT'S ATTACK WAS UNFORSEEABLE.

This is a premises liability case. Analysis in this third-party crime case turns on whether the third-party criminal act was foreseeable. *Bass v. Gopal, Inc.*, 395 S.C. 129, 135-38, 716 S.E.2d 910 (2011). A property owner has a legal duty to protect against such harm only when the criminal act in question was legally foreseeable. *Id.* at 134-35, 716 S.E.2d at 913. If the third-party criminal act was not legally foreseeable, then the property owner owes no legal duty to the injured party, and the plaintiff's claim should never get to the jury. *Id.* Therefore, foreseeability is a key element that the plaintiff must prove.

A criminal act is foreseeable if the property owner knows or has reason to know the act is reasonably likely to occur. A property owner "knows" that a third-party criminal act is going to occur when the property owner has actual knowledge—when the property owner has been informed in advance. Examples include bomb threats or warnings of gang violence. However, whether a property owner "has reason to know" a third-party criminal act is going to occur is a more fact-sensitive question.

Courts have identified four tests applied in different jurisdictions to determine whether a landowner owes a duty to protect a patron from third-party criminal acts: (1) the "imminent harm" or "specific harm" test; (2) the "prior similar incidents" test; (3) the "totality of the circumstances" test; and (4) the "balancing test." *Bass v. Gopal, Inc.*, 395 S.C. 129, 135-38, 716 S.E.2d

910 (2011). South Carolina utilizes a “balancing test” which was adopted in *Bass v. Gopal, Inc.* to make this determination. *Id.* at 135- 38, 716 S.E.2d at 913-15. The “imminent harm rule” provides that “a landowner owes no duty to protect patrons from violent acts of third-parties unless he is aware of specific and imminent harm about to befall him.” *Id.* at 135, 716 S.E.2d at 913. Prior to *Bass*, this was the law of South Carolina, as set forth in *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977), although it was called into question by the Court of Appeals in *Miletic v. Wal- Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000). In *Shipes*, the plaintiff was assaulted at night by a third- party in the parking lot of a grocery store. The plaintiff alleged there was a breach of the duty to exercise reasonable care for his protection because the evidence indicated that parking lot lights were either not shining brightly or were not turned on , and therefore, the grocery store failed to adequately light its parking lot. The court concluded the store did not have a legal duty to protect the plaintiff in these circumstances. The incident occurred between 7:30 p.m. and 8:00 p.m. The evidence indicated that the neighborhood where the store was located included several bars, a liquor store, an awning company, and a real estate insurance company. No violent crimes had been committed in the neighborhood, and the only crimes known by the store manager to have occurred at the store were the theft of an employee’s cassette tape deck in the parking lot and shoplifting in the store. One arrest, for an unspecified offense, had been made in the parking lot between 10:00 p.m. and 11:00 p.m. Based on this evidence, the court affirmed a directed verdict for the store, concluding that the store owner “did not know or have reason to know of criminal attacks such as the one on [the plaintiff].” 269 S.C. at 485, 238 S.E.2d at 169. The *Shipes* court held that Piggly Wiggly did not know or have reason to know the specific assault at issue would occur, so the defendant owed no legal duty to protect the plaintiff from the third-party criminal act.

The South Carolina Court of Appeals questioned *Shipes* in *Miletic*, which involved a customer who was abducted from a Wal-Mart parking lot and brought an action against the store for failing to protect her from this third-party criminal act. The Court of Appeals followed *Shipes* because it was the law of South Carolina, holding Wal-Mart did not have a duty to protect the plaintiff because it did not know or have reason to know the specific criminal act at issue was about to occur. However, the court also questioned the propriety of the imminent harm test and laid the groundwork for the Supreme Court to abandon it. The court noted that *Shipes* relied primarily on a similar Tennessee case but that “the law ha[d] evolved in other jurisdictions since . . . *Shipes*,” observing the Tennessee Supreme Court had overruled that case in 1996. 339 S.C. at 331, 529 S.E.2d at 69-70.

In *Bass*, the Supreme Court analyzed the various tests used by other jurisdictions and abandoned prior South Carolina law to adopt a fourth test known as the “balancing test”. The issue in *Bass* was whether a motel owner had a duty to protect motel guest from being shot by a trespasser over whom the motel had no control. George Bass rented a room for an extended period at Super Eight Motel in Orangeburg South Carolina, while he and several coworkers perform refrigeration work at a local grocery store. The Super Eight, “an exterior corridor-style motel” was owned and operated by Gopal Inc. *Bass*, 395 S.C. at 132, 716 S.E.2d at 912. During the night, Bass and his roommate heard a knock at the motel room door. After looking through the peephole of the door, Bass’ roommate did not see anyone inside. Several minutes later, they receive the second knock and noticed a man standing at the door, but they did not open the door. After the third knock, Bass and his roommate answered the door without looking through the peephole and found the same man standing several feet from the door. The man pointed a gun at Bass and asked for his money. Bass refused, and the shot Bass in the leg and fled. Bass subsequently filed suit

against Gopal and Super Eight alleging the motel was negligent in failing to protect them from the third-party crime. The circuit court granted summary judgment in favor of Gopal and Super Eight. Finding they did not owe a duty to Bass because the third-party criminal act was not foreseeable. The Court of Appeals affirmed the circuit court on the same basis, applying the similar incidents test. On appeal to the Supreme Court, Bass argued the Court of Appeals placed too much emphasis on the lack of evidence of other crimes committed at the motel prior to the assault, but instead should've considered the evidence submitted as a whole. The Supreme Court stated that "a business owner has a duty to take reasonable actions to protect its invitees against the foreseeable risk of physical harm and assessed the four basic approaches to foreseeability in the following ways. *Id* at 135, 716 S.E.2d at 913.

The Bass Court adopted the option known as the "balancing test" which acknowledges that a duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed. *Id* at 138, 716 S.E.2d at 915. The court reasoned that the more foreseeable a crime, the more onerous is a business owner's burden of providing security. *Id*. Under this test, the presence or absence of prior criminal incidences is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if the other factors support a heightened risk. *Id*.

The *Bass* court acknowledged the criticism surrounding the balance and Tess, namely that the test bleeds the line between duty and breach. *Id*. at 139, 716 S.E.2d at 915. However, the court reason that this approach does not alter the existing duty on business owners to employ reasonable measures to protect invitees from foreseeable harm. Instead, the balancing test "elucidates how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically

feasibility feasible security measures required to prevent certain crime. The court stated these especially high probability of crime at Super Eight compared to the national and state average raised at least a scintilla of evidence that the crime against Bass was foreseeable. The court reasoned that the property owner like Gopal in a high crime area even “without evidence of prior criminal incidents may be required to institute less costly measures to offset an elevated risk of harm, such as installing extra lighting, fences, locks or security cameras or simply training existing personnel on the security practices. *Id* at 141, 716 S.E.2d at 917.

Respondent, Kramer Apartments, Inc., knew about the lack of structural integrity of the windowed door they placed on Eddie Mole’s apartment. This was a defect in the common premises maintained by Kramer, and Kramer specifically precluded Eddie Mole from fixing, improving or upgrading the door pursuant to its hand-written notation on his lease agreement. (R. 64, Affidavit of Gary Mole) Therefore, only Kramer had the power to make necessary repairs to the door and they failed to do so. Kramer was on notice of the door’s propensity to be easily compromised by the window pane being removed and the knob only turned to gain easy entry into the apartment because Harry Kramer observed this as early as 2012, and Eddie Mole’s two prior burglaries were both facilitated by this defective door. (R. 64, Affidavit of Gary Mole) Instead of securing the door, Kramer cheaply and negligently replaced the lock on the broken door and placed plexiglass in the windowpane area after each robbery, and did not even replace the door or fix the broken windowpane. Kramer had specific knowledge of the insufficiency of the windowed door which had been repaired by them in a substandard way. Kramer Apartments took no steps, which were all within their power since they specifically precluded Eddie Mole from repairing or replacing the door, to minimize the predictable risk to Eddie Mole after the first two break-ins and similar break-

in of which they were on notice of since Mr. Kramer was the first person to observe and report a burglary facilitated by the defective door. (R. 64, 71, 73, 76 Affidavit of Gary Mole)

CONCLUSION

The Respondent has failed to meet the standard for summary judgment under South Carolina case law and the South Carolina Rules of Civil Procedure. Genuine issues of material fact remain and the grant of summary judgment to Respondent should be reversed.

July 23, 2020

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on opposing counsels, H. Ford Thrift and Morgan S. Templeton, by emailing it on July 23, 2020, addressed to H. Ford Thrift, Esquire and Morgan S. Templeton, Attorneys for the Respondent, at ford.thrift@walltempleton.com.

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