Order

Michigan Supreme Court
Lansing, Michigan

June 3, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

161007

COSETTE ROWLAND, Personal Representative,
of the ESTATE OF VIRGINIA KERMATH,
Plaintiff-Appellant,

v

SC: 161007
COA: 345650
Oakland CC: 2016-156377-NO

INDEPENDENCE VILLAGE OF OXFORD,
LLC, UNIFIED MANAGEMENT SERVICES,
and SENIOR VILLAGE MANAGEMENT,
Defendants-Appellees.

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On December 8, 2021, the Court heard oral argument on the application for leave to appeal the January 14, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and we VACATE the Oakland Circuit Court's June 26, 2018 opinion and order granting summary disposition to the defendants. We REMAND this case to the Oakland Circuit Court for further proceedings consistent with this order.

The Court of Appeals erroneously concluded that the defendants did not owe the decedent, Virginia Kermath, a common-law duty of care. A common-law duty of care exists when "the relationship between the actor and the injured person gives rise to [a] legal obligation on the actor's part for the benefit of the injured person." *Moning v Alfono*, 400 Mich 425, 438-439 (1977). "[I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk." *Id*. at 443, quoting Prosser, Torts (4th ed), § 53, p 324 (brackets in original).

> While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including—unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy—whether in the particular

> case the risk of harm created by the defendants' conduct is or is not reasonable. [*Moning*, 400 Mich at 438.]

We consider numerous factors in determining whether a common-law duty of care exists, including the following: (1) foreseeability of the harm, (2) degree of certainty of injury, (3) closeness of connection between the conduct and injury, (4) moral blame attached to the conduct, (5) policy of preventing future harm, and (6) the burdens and consequences of imposing a duty and the resulting liability for breach. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 (2004).

As we recognized in *Clark v Dalman*, 379 Mich 251, 260-261 (1967):

> Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.

The existence of a relationship between the parties is critical because generally "there is no duty that obligates one person to aid or protect another," *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499 (1988), citing 2 Restatement Torts, 2d, § 314, p 116, and the duty to protect is imposed upon the person in control because that person is best able to provide a place of safety, *Williams*, 429 Mich at 499. The parties do not dispute that Ms. Kermath and defendant Independence Village of Oxford, LLC, had a landlord-tenant relationship at the time of her death. We have long recognized that there is a special relationship between a landlord and its tenants. See *Bailey v Schaaf*, 494 Mich 595, 604-606 (2013); *Williams*, 429 Mich at 499-500. A landlord has a duty "to maintain the physical premises over which they exercise control." *Bailey*, 494 Mich at 604. In *Bailey* we recognized that a landlord's duty extends beyond maintaining the premises to include an obligation of reasonable care to expedite police involvement where the landlord has notice of a specific situation on the property that "would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. at 614. The landlord-tenant relationship weighs in favor of imposing a common-law duty of care.[1]

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[1] In addition to declining to recognize a new special relationship that plaintiff advocated for, the Court of Appeals also gave no weight to the existence of an undisputed landlord-tenant relationship when assessing whether defendants owed a duty of care under our common-law standards. While this decision may have been premised on the Court of

The harm at issue was objectively foreseeable. Ms. Kermath was injured and later passed away after she exited a door in a common area of the building, which was under the exclusive control of the landlord, and she was locked out in the cold due to the door having an automatic lock. A reasonable person could anticipate that an elderly resident living in an unlicensed independent-living facility where the average age of the residents exceeds 80 years old could become locked out of a building after exiting an automatically locking door on a cold winter morning. See *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 338 (2018) ("Under Michigan common law, foreseeability depends on whether a reasonable person could anticipate that a given event might occur under certain conditions.") (quotation marks and citation omitted). Tenants of any age may become locked out of their apartment building from time to time, regardless of age or mental capacity, and this possibility becomes more likely in a residential complex specifically catering to the elderly. The average age of the residents at the facility in question coupled with frequent below-freezing temperatures during winter months in Michigan also increases the risk of hypothermia or other serious injury when a lockout occurs.

The other factors also weigh in favor of imposing a common-law duty of reasonable care. The moral blame attached to the conduct and the policy of preventing future harm weigh in favor of imposing a duty of reasonable care on the defendants. The record shows that Independence Village of Oxford intentionally marketed and catered to elderly individuals who are in need of greater support than the general population. A substantial premium is charged for tenancy at the facility, which includes two hot meals a day, biweekly housekeeping, and laundry services. The record shows that the facility also provided daily check-in calls, a pull-cord alert mechanism in units, and an on-site third-party contractor who offers additional homecare and medical services for a fee, measures that strongly suggest the landlord had some knowledge that certain residents would require additional assistance beyond that of an average tenant. The potential burden associated with taking reasonable measures to prevent residents from being locked out and unable to alert staff, such as installing a buzzer or cameras, appears minimal when compared to the potential harm that could befall residents. Finally, imposition of a legal duty of care will reduce the chance of elderly or cognitively impaired residents from being injured should they become locked outside on a cold, wintry Michigan day.[2]

Appeals' conclusions about foreseeability, *Moning*, *Williams*, and *Bailey* make clear that the existence of a relationship between the parties is always legally relevant to whether a duty of care exists at common law, even when a party is not bringing a claim based on a landlord's duty to maintain the common areas of the property for premises-liability purposes.

[2] While not binding, at least one other court has held that an independent senior living facility had the specific common-law duty to monitor its automatic locking doors under

It was reversible error for the Court of Appeals to hold that, as a matter of law, no defendant owed Ms. Kermath a common-law duty of reasonable care. As the defendants' counsel agreed at oral argument, under the circumstances of this case, whether the landlord's failure to take specifically alleged precautions that might have prevented the lockout or Ms. Kermath's injuries raises questions of breach and causation, not duty. We express no opinion on the questions of breach or causation and leave those issues to be determined in the first instance on remand.[3]

ZAHRA, J. (*dissenting*).

The majority incorrectly holds that defendants owed a duty of care at common law to decedent Virginia Kermath. I write to point out three flaws in the majority's holding and analysis. First, the majority has allowed plaintiff to reframe her position from that advocated for below, leading the majority to answer a question that neither lower court answered. Second, a prerequisite for the imposition of such a duty of care on a defendant is that the harm be reasonably foreseeable. But the harm to Kermath was *not* reasonably foreseeable; therefore, no duty can be imposed on these defendants. Third, the majority incorrectly applies two additional factors used to determine whether a common-law duty of care exists. If properly applied, these factors would further support the conclusion that no duty can be imposed on defendants. I would deny leave to appeal.

First, in this Court, plaintiff argued that the Court of Appeals erred by not recognizing the existence of the landlord-tenant relationship or the legal effect of such a relationship. The question of whether a landlord-tenant relationship existed was not at issue below, as plaintiff did not premise her argument that Independence Village owed Kermath a duty on the parties' landlord-tenant relationship.[4] Quite simply, the lower

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similar facts. See *Washnock v Brookdale Senior Living, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 6, 2014 (Case No. 12-11607).

[3] The circuit court held that "Defendants are entitled to summary disposition because they did not breach any duty owed to Kermath." The circuit court's summary disposition decision contained no citation of legal authority other than MCR 2.116(C)(8) and (10), and we cannot determine from its statements whether the circuit court determined that the defendants owed no duty or that the defendants did not breach any duty owed as a matter of law. Therefore, we leave this to the parties and the circuit court to address on remand.

[4] See *Rowland v Independence Village of Oxford, LLC*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 345650), p 6 n 2 (acknowledging that "[a] special relationship generally exists between a landlord and its tenants," but observing that "[p]laintiff does not claim that Virginia's special relationship with defendants arose from a landlord-tenant relationship").

courts did not focus on the landlord-tenant relationship because its existence was irrelevant to plaintiff's theory of the case. The reframing of the issues in this case leads the majority to misstate the holdings of the lower courts. The lower courts did not broadly hold that defendants did not owe a duty to Kermath. Rather, they held that the defendants did not owe the duty to Kermath that plaintiff asked them to recognize: a duty to monitor the exit doors at Independence Village untethered to its status as a landlord.

Second, in 2012, this Court explained the critical importance of foreseeability to the proper analysis of whether a defendant owes a duty of care:

> Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. We have recognized, however, that the most important factor to be considered in this analysis is the relationship of the parties and also that *there can be no duty imposed when the harm is not foreseeable*. In other words, *before a duty can be imposed*, there must be a relationship between the parties *and the harm must have been foreseeable*.[5]

Said another way, "When the harm is not foreseeable, no duty can be imposed on the defendant."[6]

Both the trial court and the Court of Appeals specifically found that the harm in this case was *not* reasonably foreseeable. The trial court granted summary disposition to defendants under MCR 2.116(C)(8) and (10) because it found that they did not owe Kermath a duty of care and that the harm to her was not foreseeable. The Court of Appeals was more precise about the connection between duty and foreseeability, holding that even if it "were to decide that Independence Village had a special relationship with their residents, there still would be no duty because it was not foreseeable that Kermath would wander outside at night in December, wearing just her nightgown and without her keys" and be harmed in the process.[7] I am inclined to agree with those courts' analyses and conclusions. As tragic as Kermath's death is, on these facts, I cannot say that the

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[5] *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661 (2012) (emphasis added; quotation marks, citations, and brackets omitted). See also *In re Certified Question From the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 508-509 (2007).

[6] *In re Certified Question*, 479 Mich at 508. See also *Buczkowski v McKay*, 441 Mich 96, 101 (1992) (stating that because "the foreseeability of the risk" alone can be dispositive, it is often "the first component examined by the court").

[7] *Rowland*, unpub op at 7. See also *id*. at 4-6 (analyzing foreseeability).

harm she suffered was reasonably foreseeable, which also means that defendants did not owe her a duty of care.[8]

Whether a harm is reasonably foreseeable "depends on whether a reasonable person 'could anticipate that a given event might occur under certain conditions.' "[9] The factual circumstances of the case—i.e., the parties' relationship to each other—define the risk.[10] The foreseeability test is objective in nature; it "focuses on what risks a reasonable participant, under the circumstances, would have foreseen."[11] "*Notice* is critical to [a] determination whether a landlord's duty is triggered[.]"[12] "[I]n order to show notice, [a] plaintiff ha[s] to demonstrate that [the] defendant knew about the alleged [dangerous condition] or should have known of it because of its character or the duration of its presence."[13] A landlord "has a duty to exercise reasonable care to protect invitees from *an unreasonable risk of harm caused by a dangerous condition of the land*."[14] In other words, to say that a landlord owes a duty of care to their tenant on the basis of reasonably foreseeable harm is to say that they owe a duty of care when a reasonable person would have notice of an unreasonable risk of harm caused by a dangerous condition or defect on the premises.[15] That is not this case.

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[8] *Hill*, 492 Mich at 661; *In re Certified Question*, 479 Mich at 508-509.

[9] *Iliades v Dieffenbacher North America, Inc*, 501 Mich 326, 338 (2018), quoting *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406 (1975).

[10] *Bertin v Mann*, 502 Mich 603, 620 (2018).

[11] *Id*.

[12] *Bailey v Schaaf*, 494 Mich 595, 615 (2013).

[13] *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 11 (2016).

[14] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499 (1988) (emphasis added). Accord *Lowrey*, 500 Mich at 8 ("A premises owner breaches its duty of care when it knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.") (quotation marks and citation omitted).

[15] Defendants did not owe Kermath a duty of care at common law because the harm that befell her was not reasonably foreseeable. On that ground alone, leave to appeal should be denied: There is no duty of care where the harm is not reasonably foreseeable. But the majority also misconstrues the relevance of *Moning v Alfono*, 400 Mich 425 (1977), as to the issue of duty. *Moning* teaches that while the Court "decides questions of duty [and the] general standard of care," the jury decides "the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care . . . ." *Id*. at 438. Rather than apply *Moning* to determine whether defendants owed Kermath a duty of reasonable care, the majority presumes a duty by discussing the

Here, defendants were not on notice regarding any sort of potential harm to Kermath, let alone the fact-specific harm presented by this case. Kermath's own children testified that they did not foresee the occurrence of this harm and also that they did not make Independence Village—an independent senior-living facility—aware of any concerns that they had regarding Kermath's safety, state of mind, overall health, or general behavior.[16] As the Court of Appeals explained, "Even though [Kermath's] health had deteriorated, her family found it unforeseeable that [she] would wander outside in only her nightgown on a December morning."[17] And besides, doors that automatically lock from the outside (for the safety of residents) cannot reasonably be classified as a "dangerous condition" or a "defect" on the premises that pose an "unreasonable risk of harm."

"It is sometimes useful for courts to emphasize that common sense, as well as precedent, recommends a particular course of action."[18] Such is the reality here. Simply put, it cannot be fairly said that Independence Village reasonably should have foreseen that Kermath might be harmed by something as commonplace as exterior locking doors that were installed for the safety of the residents. This is all the more true given that Kermath's *own children*, as well as her personal caretaker, did not anticipate that this harm, or any harm even in the same ballpark, would befall her.[19] I do not believe that

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potential burden on defendants of taking measures to prevent residents from being locked out and unable to alert staff.

[16] See Defendants-Appellees' Answer, p 9 (citing deposition testimony of Kermath's two children, Cosette Rowland and Chris Kermath, that they did not believe that their mother would wander out of the building and be hurt); *id*. at 9-10 (citing testimony that neither of Kermath's children shared their observation with Independence Village that their mother's health was declining and that she was becoming more forgetful by the end of 2013); *id*. at 10 (citing deposition testimony of Octavia Jones, the independent caretaker hired by Kermath's children to assist Kermath while she lived at Independence Village, who stated that she shared her concerns about Kermath's safety only with Rowland, not with Independence Village).

[17] *Rowland*, unpub op at 6. It is certainly possible to quibble with the Court of Appeals' formulation of what needed to have been foreseeable. But, even pitched at a higher level of generality, it is incorrect to say that the harm was reasonably foreseeable for the reasons I have given.

[18] *Bailey*, 494 Mich at 619 (MCCORMACK, J., concurring).

[19] Because the harm is not foreseeable, the majority's analysis of various other factors that comprise a common-law duty of care is unnecessary. See *Buczkowski*, 441 Mich at 101 (stating that because "the foreseeability of the risk" alone can be dispositive, it is

plaintiff has shown that the harm to Kermath was reasonably foreseeable, which means that defendants did not owe Kermath a duty of care.

Third, the majority misapplies two other factors courts consider to determine whether a duty exists: moral blame and preventing future harm.[20] The majority contends that defendant Independence Village catered to the elderly and provided them with additional services beyond those typically offered to average tenants. But the majority fails to acknowledge that the lease expressly provided that Independence Village had no responsibility for security measures.[21] The additional services that Independence Village offered in no way affected residents' freedom to come and go as they pleased, and the fact that Kermath had to contract with a third party, rather than Independence Village, for additional assistance demonstrates that Independence Village bore no responsibility for providing additional assistance for residents who were not able to live independently. Thus, the idea that any moral blame lies with defendants is not supported by the record. The majority's policy basis is also unclear. If, as the majority contends, the policy of preventing future harm weighs in favor of requiring an *independent* living facility to install a buzzer or cameras for when its tenants lock themselves out, one would be hard pressed to explain why traditional apartment complexes—or even an individual renting out a room to an elderly tenant—would not also be required to take these precautions. The majority points to no caselaw that would support such an extreme expansion of a landlord's duty to maintain the premises over which it exercises control.

For these reasons, I believe that defendants did not owe Kermath a duty of care. Because a majority of this Court holds otherwise, I respectfully dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

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often "the first component examined by the court"). See also *Hill*, 492 Mich at 661; *In re Certified Question*, 479 Mich at 508-509.

[20] See *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 (2004) (listing "moral blame attached to the conduct" and "policy of preventing future harm" as among the factors) (quotation marks and citations omitted).

[21] To the extent the majority's order extends a duty contrary to that which the parties had agreed to, it raises troubling implications for the right of freedom of contract. See *Rory v Continental Ins Co*, 473 Mich 457, 468-469 (2005) (explaining that a court undermines the freedom of contract when it abrogates an unambiguous contractual provision to impose its own assessment of reasonableness).

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 3, 2022

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Clerk