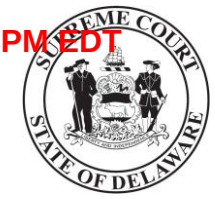

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL HYNSON, Plaintiff Below, Appellant, v. BURNBRAE MAINTENANCE ASSOCIATION, Defendant Below, Appellee.	)	No. 117,2014

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Appellant (Plaintiff below, hereafter "plaintiff") filed suit against the Appellee (defendant below, hereafter "defendant", "Burnbrae Maintenance Association" or "BMA") and other defendants for negligence after he was shot multiple times in the parking lot of the Burnbrae Condominiums located in New Castle, Delaware.

The initial defendants were the shooter, Davear Whittle, the Burnbrae Maintenance Association, the Burnbrae Condominium Association and Brenda Korban. The Burnbrae Condominium Association was voluntarily dismissed because it was a defunct entity. Default Judgment was entered against Davear Whittle after he failed to appear or respond to the Complaint. An inquisition hearing was held on May 20, 2014 resulting in a $275,000 judgment being entered against Davear Whittle. Mr. Whittle is currently incarcerated and the judgment has not been recovered.

The two remaining defendants, the Burnbrae Maintenance Association and condominium owner Brenda Korban moved for summary judgment under the Premises Guest Statute, 25 Del. C. § 1501, arguing that the plaintiff was a "guest without payment" and thus they did not owe him an ordinary duty of care to keep the premises safe. Korban argued that if she did owe a duty care to the plaintiff, her duty was undertaken by the BMA.

Oral argument on the summary judgment motions was held on September 13, 2013. On October 4, 2013, the Superior Court requested supplemental briefing on the issue of the BMA's control of the common areas.

On December 24, 2013, the Superior Court issued an Opinion and Order granting summary judgment to the BMA and Korban. The Superior Court ruled that as to the BMA the plaintiff was a "guest without payment" and thus the BMA owed only a duty to refrain from wilful and wanton conduct and no such allegations existed. As to Korban, the Superior Court ruled that the plaintiff was a business invitee but Korban's duty to the plaintiff did not trigger because she delegated control of the common areas to the BMA. The Court did not address Korban's claim that the BMA undertook her duty.

On January 2, 2014, the plaintiff filed a timely motion for reargument seeking the Superior Court to reconsider its ruling that no evidence of a benefit to the BMA had been put forth and to consider the argument that had been generally raised earlier that the BMA undertook Korban's duty of care. The Superior Court held oral argument on plaintiff's motion for reargument on February 7, 2014 but denied the motion.

Plaintiff appeals the Superior Court's decision granting summary judgment to the BMA. Plaintiff does not appeal the Superior Court's decision granting summary judgment to Korban.

SUMMARY OF ARGUMENT

1. The Superior Court was required to construe the facts in the light most favorable to the plaintiff as the nonmoving party. The Superior Court committed reversible error by failing to construe the fact that approximately 60% of the Burnbrae Condominiums are rented by their owners and that some owners own and rent multiple units in favor of the plaintiff. Viewed through the appropriate lens, the reasonable inference to be drawn from the fact that a significant number of unit owners are acting as landlords is that they are doing so for a financial business purpose and they are, therefore, more likely to be able to pay their dues in full and on time which directly benefits the BMA. The Delaware precedent set forth in *Hoksch v. Stratford Apartments* that a landowner or occupier receives a benefit from allowing social guests of tenants on the premises aptly applies in this case.

STATEMENT OF FACTS

This is a personal injury action. On March 15, 2011, the plaintiff was at the Burnbrae Condominiums visiting a family friend, Delorna Marks. Ms. Marks rented a condominium unit from defendant Brenda Korban. After returning from dinner, the plaintiff witnessed a robbery about to occur in the parking lot of the Burnbrae Condominiums and acting as a Good Samaritan, he intervened and was shot multiple times. (A6-83, A118).

The Burnbrae Maintenance Association is comprised of all the individual unit owners in the Burnbrae Condominiums. Together, the unit owners share an equal and undivided interest in the common areas which includes the parking lot where the plaintiff was shot. The unit owners collectively delegate their duty to operate, care, upkeep and maintain those common areas to the BMA. The scope of that delegation is set forth in the Declaration of Condominium and the Rules and Regulations of the Burnbrae Condominiums. The agreements provide, among other things, that the unit owners are permitted to rent their units, unit owners shall notify the BMA of a lease and unit owners, and their tenants and invitees have the right to use the common elements. The agreements also provide that the BMA shall obtain general liability insurance. (A197-521).

In 2008, approximately 60% of the condominium units were rented to tenants and approximately eight owners owned multiple units that they rented out.

(A161, A177, A651-654, A765). All of the unit owners are responsible for paying dues to the BMA whether their units are occupied or unoccupied. (A191)

The BMA was aware of criminal activity occurring in the common areas of the condominium complex but failed to institute any security measures. New Castle County Police records show that 49 different criminal incidents were reported in the Burnbrae community in the three years prior to this shooting. Plaintiff's liability expert opines that the BMA breached the standard of care by failing to provide security or take any action whatsoever to prevent criminal activity on the premises despite the area's extensive criminal history. (A110-115, A155, A173-175, A200-201)

The BMA and Korban moved for summary judgment on the ground that they did not owe a duty to keep the premises reasonably safe for the plaintiff. The Superior Court granted their motions. Ex. 1.

The Superior Court ruled that application of the Guest Premises was not determinative because if the plaintiff was a "guest without payment" or "licensee" then the duty of care was to refrain from wilful or wanton negligence and not an ordinary duty of reasonableness. Ex. 1 at p. 6-7.

The Superior Court ruled that the plaintiff was a business invitee of Korban because he was a social guest of her tenant and pursuant to *Hoksch v. Stratford Apartments* she received a benefit by the plaintiff's presence. Ex. 1 at p.8. The

Superior Court ruled however that Korban's duty to the plaintiff did not trigger because she delegated complete control of the parking lot where the plaintiff was shot to the BMA. Ex. 1 at p. 9. The Superior Court did not address Korban's claim that her duty was undertaken by the BMA. (A171-21, A553)

As to the BMA, the Superior Court ruled that the plaintiff was a "guest without payment" because there was no evidence presented that the BMA received a benefit from allowing unit owners to rent their condominiums and having social guests of their tenants on the premises. Ex. 1 at p. 3, 11. The Superior Court ruled that the BMA owed the plaintiff a duty to refrain from wilful and wanton negligence and no such allegations existed. Ex. 1 at p. 11.

The plaintiff moved for reargument on the ground that the Superior Court misapprehended the law and facts in its reliance on *Koons v. Sea Colony, Inc.* and for failing to consider whether the BMA undertook Korban's duty of care to the plaintiff. (A569-573, A623-632)

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONSTRUE THE FACT THAT 60% OF THE CONDOMINIUMS ARE RENTED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF AND IN ACCORDANCE WITH THE PRECEDENT SET FORTH IN *HOKSCH V. STRATFORD APARTMENTS* WHICH ESTABLISHES A BENEFIT TO THE BMA

A. QUESTION PRESENTED

Whether the Burnbrae Maintenance Association received a benefit from allowing its owners to rent their condominiums and having the social guests of their tenants on the premises. (A120-121, A176-194, A569-571, A624-632)

B. SCOPE OF REVIEW

The Superior Court's grant of a summary judgment motion is reviewed *de novo*. *Conagra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62 (Del. 2011). Whether a duty exists is a question of law which is also reviewed *de novo*. *Pipher v. Parsell,* 930 A.2d 890 (Del. 2007).

Summary judgment is appropriate when there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law, viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991). The Court is "free to draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence." *Williams v. Geier,* 671 A.2d

1368, 1375 (Del. 1996). Reasonable inferences to be drawn from the factual record must be viewed in the light most favorable to the nonmoving party." *Id.*

C. MERITS OF ARGUMENT

1. The benefit received by the Burnbrae Maintenance Association from allowing unit owners to rent their condominiums and having the social guests of their tenants on the premises is self-evident

The focus of this appeal is whether the plaintiff was a business invitee or a "guest without payment" as to the BMA. Whether a person is a business invitee depends on whether his presence on the premises bestows or is expected to bestow a benefit of value on the landowner or occupier. *See Stratford Apts., Inc. v. Fleming,* 305 A.2d 624, 626 (Del. 1973). The benefit received does not have to be financial; any benefit of value will suffice. *Id., citing Mumford v. Robinson*, 231 A.2d 477 (Del. 1967). The term "occupier" includes possessors, tenants, and landlords who physically control and exercise dominion over identifiable real interests. *Id.* at 626. The BMA is an "occupier" because it has possession and complete physical control over the common areas. Ex.1 at p. 9.

The Superior Court committed reversible error when it held that the BMA did not receive a benefit from the plaintiff's presence on the premises and thus was not a business invitee of the BMA. The Superior Court held that "the parties have not presented anything to this Court that demonstrates that BMA received a benefit, economic or otherwise, from the fact that individual condominium unit

owners sometimes lease their units to third parties." Ex. 1 at p. 3. To the contrary, the plaintiff presented evidence that approximately 60% of the condominium units are rented by their owners and that eight owners owned multiple units that they rented out to tenants. The plaintiff demonstrated how these facts evidence a benefit to the BMA by citing to *Hoksch v. Stratford Apartments,* 283 A.2d 687 (Del. Super. 1987) for the clear enunciation of Delaware law that an owner/ occupier benefits from allowing social guests of its tenants on the premises. In *Hoksch,* the social guest of a tenant was injured in a common area controlled by the landlord. The Court held that the social guest of the tenant was a business invitee of the landlord because the landlord received a benefit from allowing tenants to have guests come and go as they pleased. The Court found the benefit to be self-evident that allowing tenants to have social guests would make the premises a more attractive place to rent thus conferring a benefit on the landlord.

The reasoning in *Hoksch* applies here. The benefit conferred on the BMA by allowing owners to act as landlords is self-evident just like it was in *Hoksch.* By allowing unit owners to rent their units and use them for investment purposes, the Burnbrae Condominiums becomes a more attractive place to purchase a condominium because it can be used as a residence or as an investment to make money. All of the unit owners are responsible for paying dues to the BMA whether the units are occupied or unoccupied. The BMA benefits by having

owners who are financially capable of paying their dues. The fact that approximately 60% of the units are owned for investment purposes is significant because one can draw the reasonable inference that if the units are rented by owners who are acting as landlords, they are doing so for a financial business purpose and they are, therefore, more likely to be able to pay their dues in full and on time. That benefits the BMA directly because it can afford to fulfill its obligation to safely maintain the common areas.

The Superior Court cited to *Koons v. Sea Colony, Inc.*, 1997 WL 524085 (Del. Super. 1997) for the proposition that:

> Condominium associations generally do not receive a benefit from allowing individual unit owners or their tenants to have guests. The social guest of a tenant of a condominium is not a business invitee of the condominium association. SJ at 9-10.

The *Koons* case is distinguishable. The Court there addressed the status of a social guest of a unit owner to the unit owner and condominium association and held that condominium associations generally do not receive a benefit from social guests of *unit owners*. The Court in *Koons* did not address the status of a social guest of a unit owner's tenant to the unit owner and condominium association. The case *sub judice* is more akin to *Hoksch* because the plaintiff was a social guest of a tenant and not an owner as in *Koons*.

Because the BMA received a benefit by the presence of the plaintiff on the premises, the plaintiff is a business invitee of the BMA entitled to reasonable protection from criminal acts of third persons.

2. A question of facts exists whether the Burnbrae Maintenance Association met its duty to keep the premises in a reasonably safe condition which precludes summary judgment

The general rule in Delaware is that a landowner or occupier has a duty to exercise reasonable care to keep its premises in a safe condition for the benefit of business invitees. *Elder v. Dover Downs, Inc.,* 2012 WL 2553091 (Del. Super. July 2, 2012). This duty includes exercising reasonable care to protect business invitees from the criminal acts of third person. *Jardel Co., Inc. v. Hughes,* 523 A.2d 518 (Del. 1987). Because the BMA received a benefit from the plaintiff's presence on the premises, the plaintiff was a business invitee entitled to reasonable protection from criminal acts of third persons. Evidence exists that the BMA acted unreasonably by failing to provide security or take any action whatsoever to prevent criminal activity on the premises despite the known extensive criminal history. Therefore, whether the BMA satisfied its duty of care is a question of fact for the jury to determine which precludes summary judgment.

CONCLUSION

The Superior Court committed reversible error in holding that the plaintiff was a "guest without payment" as to the Burnbrae Maintenance Association because there is no evidence that the BMA received a benefit from allowing unit owners to rent their condominiums and having social guests of their tenants on the premises. Evidence was presented to the Superior Court that approximately 60% of the condominium units were rented. The Superior Court failed to construe that fact in the light most favorable to the plaintiff and in accordance with the precedent set forth in *Hoksch v. Stratford Apartments.* Had it done so, the benefit to the BMA would be self-evident and would establish that the plaintiff was a business invitee of the BMA. For these reasons, the judgment of the Superior Court should be reversed.

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