STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

DEVON SCOTT BAILEY,

Plaintiff-Appellee/
Cross-Appellant,

v

STEVEN GEROME SCHAAF,

Defendant,

and

T.J. REALTY, INC., d/b/a HI-TECH PROTECTION, TIMOTHY JOHNSON, CAPTAIN WILLIAM BOYD BAKER, CHRISTOPHER LEE CAMPBELL,

Defendants-Appellees,

and

EVERGREEN REGENCY TOWNHOMES, LTD., and RADNEY MANAGEMENT & INVESTMENTS,

Defendants-Appellants/
Cross-Appellees.

S. Ct. No. 144055
COA No. 295801
LC No. 07-087454-NO
Genesee Circuit Court
Hon. Joseph J. Farah

DEFENDANTS-APPELLANTS/CROSS-APPELLEES EVERGREEN REGENCY TOWNHOMES, LTD. and RADNEY MANAGEMENT & INVESTMENTS'

REPLY BRIEF

COUNSEL OF RECORD

Donald M. Fulkerson (P35785)
Attorney for Plaintiff-Appellee/
Cross-Appellant
P.O. Box 85395
Westland, MI 48185
(734) 467-5620

David A. Robinson (P25668)
Attorney for Plaintiff-Appellee/
Cross-Appellant
28145 Greenfield Road, Suite 100
Southfield, MI 48076
(248) 423-7234

Gary P. Supanich (P45547)
GARY P. SUPANICH PLLC
Attorney for Defendants-
Appellants/Cross-Appellees
117 North First Street, Suite 111
Ann Arbor, MI 48104
(734) 276-6561

Thomas E. Keenan (P25668)
PEDERSEN, KEENAN, KING,
WACHSBERG & ANDRZEJAK, P.C.
Attorneys for Defendants-
Appellants/Cross-Appellees
4057 Pioneer Drive, Suite 300
Commerce Township, MI 48390
(248) 363-6400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Other Authority

INTRODUCTION

The principal issue before this Court is whether to extend the rule stated in *MacDonald v PKT, Inc*, 464 Mich 322 (2001) to landlords and other premises proprietors to involve the police when a situation on the premises presents an imminent risk of harm to identifiable invitees. In answering this question, a crucial distinction must be drawn between maintaining the physical condition of the premises in a reasonably safe manner and protecting tenants against criminal acts thereon. While a landlord has the duty to maintain the physical condition of the premises in good repair and reasonably safe, this does not extend to protecting tenants and their guests against criminal acts, absent special circumstances.

ARGUMENT

(1) This Court Has Plenary Power Pursuant to the Michigan Constitution, Art VI, § 4, to Review Unpreserved Arguments That Are Necessary for the Proper Determination of a Question of Michigan Law.

At the outset, it is necessary to dispose of Appellee's facile contention that this Court may not consider Appellants' unpreserved arguments. (Apl. Br., p 25). Unquestionably, to address in satisfactory fashion the principal issue of this case, it is incumbent upon the parties to present arguments not heretofore raised or considered by the lower courts. This is perforce the case because the Court of Appeals' decision rests upon the extension of the limited duty found in *MacDonald,* a ground that Appellee never raised in his appeal brief to that court. Thus, even though appellate consideration of unpreserved claims is generally disfavored, it is not foreclosed, particularly as to those arguments that arise only after the Court of

Appeals reverses a trial court's decision on a novel basis. This is especially true of arguments necessary to the proper determination of an issue of Michigan law where "the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427 (2006). Finally, this Court may consider unpreserved issues and arguments in affirming a trial court's order granting summary disposition on a right result/wrong rationale basis. See *Mack v City of Detroit*, 467 Mich 186, 209 (2000) (noting that "[t]he jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions").

(2) Whether the Court of Appeals Erred in Reversing in Part the Trial Court's Order Granting Summary Disposition to Appellants Is Reviewable Under MCR 2.116(C)(8).

There is no merit to Appellee's fallacious contention that the principal issue should be reviewed under MCR 2.116(C)(10). (Apl. Br., p 21). First, Appellants brought their motion for summary disposition as to the negligence claims stated in Counts I-VIII pursuant to MCR 2.116(C)(8) based upon the pleadings only.[1] MCR 2.116(G)(2),(5). Second, the trial court properly considered only the pleadings in granting Appellants' motion.[2] *Maiden v Rozwood,* 461 Mich 109, 119 (1999). Third,

[1] The pleadings include "only a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer." *Village of Dimondale v Grable*, 240 Mich App 553, 565 (2000).

[2] The transcript of the motion hearing clearly shows that Appellants' motion for summary disposition was pursuant to MCR 2.116(C)(8) and that Appellee's trial counsel admitted to this fact! (Supplemental Appendix, 53a-55a, 61a-62a, 68a, 72a, 74a, 78a-79a). Thus, Appellee's appellate counsel is bound by trial counsel's judicial admission and cannot contradict it. *Tozer v Kerr*, 342 Mich 136, 140 (1955) ("'The admissions of attorneys of record bind their clients, in all matters relating to the

the Court of Appeals correctly reviewed the trial court's order under the appellate standard of review for a summary disposition motion under subrule (C)(8). Contrary to Appellee's contention, the mere existence of a stray remark in a footnote at the end of the Court of Appeals' opinion does not transform this into a question reviewable under MCR 2.116(C)(10). (Apl. Br., p 21). Accordingly, this Court must analyze the issue under MCR 2.116(C)(8) and may not consider any of the deposition testimony proffered by the Appellee in deciding this matter, as it is improperly before this Court under the Michigan Court Rules and should be stricken from his appeal brief.

(3) Even if Defendant Schaaf's Criminal Acts Occurred in a Common Area, Appellants Has No Duty to Plaintiff for the Criminal Acts of a Third Party, Absent Special Circumstances.

The presumed fact that Defendant Schaaf's criminal acts took place in a common area of the premises does not materially alter the legal analysis. (Apl. Br., pp 31-33). At bottom, the source of the landlord's liability is a function of the degree of control that a landlord possesses over a condition on the premises. Consequently, the common-law principle that a landlord must take reasonable precautions to secure common areas traditionally required landlords to keep the premises reasonably safe only from physical and structural defects. This duty is based upon the landlord's exclusive capacity to maintain the premises in fit physical condition.

---

progress and trial of the cause.'")(citation omitted); *Gojcaj v Moser*, 140 Mich App 828, 833-834 (1985) ("A statement is a judicial admission only if it is a statement made by a party or his attorney during the course of trial, and is a distinct, formal, solemn admission which is made for the express purpose of dispensing with formal proof of that particular fact at trial.").

Since no individual tenant controls the physical characteristics of common areas, control remains with the landlord as a default condition. "Control" in the relevant sense is defined by Black's Law Dictionary (6th ed.) to mean "[t]he ability to exercise a restraining or directing influence over something." Thus, a landlord may be held liable for injuries on the premises if the injuries resulted from the landlord's failure to correct a defect in the common area over which control was retained.

But a sharp distinction must be made between repairing defective physical conditions and protecting tenants and their guests from criminal acts on the premises. The latter are typically beyond the control of the landlord and arise from the unpredictable conduct of others. Thus, the duty to maintain common areas in a reasonably safe physical condition should not be extended to impose a duty upon landlords to protect tenants and their guests from criminal acts.[3] Generally, a duty should be imposed only if the landlord retains both possession and control and agrees to take action in preventing criminal conduct within those parts of the premises used in common by all tenants.

[3] In the seminal case of *Kline v 1500 Massachusetts Ave Apartment Corp*, 439 F2d 477 (DC Cir 1970), however, the federal court, breaking with the longstanding common-law tradition, interpreted the landlord's duty to keep the common areas in a reasonably safe condition by exercising reasonable care to include more than freedom from physical and structural defects, extending it to foreseeable criminal acts by third parties in common areas. As between the landlord and tenant, *Kline* reasoned that only the landlord has control over the common areas, and thus is in the position to maintain them in a reasonably safe condition. As a result, liability was imposed through an extension of the general rule that a landlord has a duty of reasonable care to maintain the safety of common areas. The underlying premise of this Court's decisions in *Johnston v Harris*, 387 Mich 569 (1972) and *Samson v Saginaw Professional Building*, 393 Mich 393 (1975) rests upon *Kline's* faulty reasoning and should be rejected.

In this regard, the Supreme Court of Pennsylvania's decision in *Feld v Merriam*, 506 Pa 383; 485 A2d 742 (1984) is persuasive authority whose reasoning should be adopted here. In that case, the plaintiffs were the victims of an assault that originated in the parking garage of their large multi-unit apartment complex. In *Feld*, the court stated that "[t]he threshold question is whether a landlord has any duty to protect tenants from the foreseeable criminal acts of third persons, and, if so, under what circumstances." *Id*. at 390. In *Feld*, the court observed:

> Well settled law holds landlords to a duty to protect tenants from injury [a]rising out of their negligent failure to maintain their premises in a safe condition. . . . That rule of law is addressed to their failure of reasonable care, a failure of care caused by their own negligence, a condition of which was either known or knowable by reasonable precaution. The criminal acts of a third person belong to a different category and can bear no analogy to the unfixed radiator, unlighted steps, falling ceiling, or the other myriad possibilities of personal negligence. To render one liable for the deliberate acts of unknown third persons can only be a judicial rule for given limited circumstances." [*Id*.]

In determining whether to impose a duty upon the owners of the complex to protect tenants and their guests from the criminal acts of third parties, *Feld* made the following observations:

> The closest analogy is the duty of owners of land who hold their property open to the public for business purposes. . . . They are subject to liability for the accidental, negligent or intentionally harmful acts of third persons, as are common carriers, innkeepers and other owners of places of public resort. . . . The reason is clear: places to which the general public are invited might indeed anticipate, either from common experience of known fact, that places of general public resort are also places where what men can do, they might. One who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of reasonable precaution against the common expectation. The common areas of an apartment are not open to the public, nor are the general public expected or invited to gather there for other purposes than to visit tenants.

> Tenants in a huge apartment complex . . . do not live where the world is invited to come. Absent agreement, the landlord cannot be expected to protect them against the wiles of felonry any more than the society can always protect them upon the common streets and highways leading to their residence or indeed in their home itself.
>
> An apartment building is not a place of public resort where one who profits from the very public it invites must bear what losses that public may create. It is of its nature private and only for those specifically invited. The criminal can be expected anywhere, any time, and has been a risk of life for a long time. He can be expected in the village, monastery and the castle keep. [*Id*. at 390-391.]

In light of these considerations, the Supreme Court of Pennsylvania held that the landlord had no duty to protect tenants and their guests from criminal acts, absent an agreement to do so:

> In the present case the Superior Court departed from the traditional rule that a person cannot be liable for the criminal acts of third parties when it held "that in all areas of the leasehold, particularly in the area under his control, the landlord is under a duty to provide adequate security to protect his tenants from the foreseeable criminal actions of third persons." . . .
>
> The Superior Court viewed the imposition of this new duty as merely an extension of the landlord's existing duty to maintain the common areas to be free from the risk of harm caused by physical defects. However, in so holding that court failed to recognize the crucial distinction between the risk of injury from a physical defect in the property, and the risk from the criminal act of a third person. In the former situation the landlord has effectively perpetuated the risk of injury by refusing to correct a known and verifiable defect. On the other hand, the risk of injury from the criminal acts of third persons arises not from the conduct of the landlord but from the conduct of an unpredictable independent agent. To impose a general duty in the latter case would effectively require landlords to be insurers of their tenants' safety: a burden which could never be completely met given the unfortunate realities of modern society.
>
> Our analysis however does not stop here, for although there is a general rule against holding a person liable for the criminal conduct of another absent a preexisting duty, there is also an exception to that rule, i.e., where a party assumes a duty, whether gratuitously or for consideration, and so negligently performs that duty that another suffers damage . . . .

* * *

> Absent therefore an agreement wherein the landlord offers or voluntarily proffers a program, we find no general duty of a landlord to protect tenants against criminal intrusion. However, a landlord may, as indicated, incur a duty voluntarily or by specific agreement if to attract or keep tenants he provides a program of security. A program of security is not the usual and normal precautions that a reasonable home owner would employ to protect his property. It is, as in the case before us, an extra precaution, such as personnel specifically charged to patrol and protect the premises. Personnel charged with such protection may be expected to perform their duties with the usual reasonable care required under standard tort law for ordinary negligence. When a landlord by agreement or voluntarily offers a program to protect the premises, he must perform the task in a reasonable manner and where a harm follows a reasonable expectation of that harm, he is liable. The duty is one of reasonable care under the circumstances. It is not the duty of an insurer and a landlord is not liable unless his failure is the proximate cause of the harm. (*Id.* at 391-394)(Footnote omitted)(Emphasis added.)

The reasoning in *Feld* applies with equal force to the present case. As noted in *Feld*, protecting tenants from the criminal acts of third parties is categorically different than maintaining the physical infrastructure of the premises. Moreover, unlike premises owners, such as merchants, "who hold their property open to the public for business purposes," *Feld* correctly recognized that "[t]he common areas of an apartment are not open to the public, nor are the general public expected or invited to gather there for other purposes than to visit tenants." In fact, by its very nature, an apartment building is "private" and "only for those specifically invited" by the tenants. Because "[t]he criminal can be expected anywhere, any time" and because "the risk of injury from the criminal acts of third persons arises not from the conduct of the landlord, but from the conduct of an unpredictable independent agent," there was no basis for extending "the landlord's existing duty to maintain

the common areas to be free from the risk of harm caused by physical defects." Absent an agreement to protect tenants against criminal acts, the imposition of duty "would effectively require landlords to be insurers of their tenants' safety." The same analysis applies here.

In determining not to impose a duty upon the Appellants, it is also useful to treat a residential tenancy as creating a limited easement through the common areas in order to allow tenants and their guests' access to their apartments. See *Commonwealth v Nelson*, 74 Mass App Ct 629; 909 NE2d 42 (2009). Ordinarily, "it is the owner of the easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties." *Morrow v Boldt*, 203 Mich App 324, 329-330 (1994). As such, while retaining legal ownership over the common areas, the landlord grants a non-exclusive easement to the tenants and their guests over the common areas. Thus, the question becomes who has the legal duty, if any, to maintain the easement in a safe condition so as to prevent injuries caused by criminal acts. *Cf. Quinlivan v The Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 265-267 (1975) (noting that "'control and possession' of the premises is critical in determining whether a landlord, tenant, or both will be liable for injuries sustained on the premises"), citing *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 339 (1959) and *Siegel v Detroit City Ice & Fuel Co*, 324 Mich 205 (1949).

Because tenants have exclusive possession and control of the demised premises, *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 605-606 (1993);

Ann Arbor Tenants Union v Ann Arbor YMCA, 229 Mich App 431, 443 (1998), it follows that, as holders of non-exclusive easement rights, they are in a better position than the landlord to control the common areas with regard to the possibility of criminal acts of third parties. Accordingly, in contrast to the physical condition of the common areas, Appellants should not be considered to have control over the "common outdoor area" at issue so as to have a duty to protect Appellee against criminal acts occurring thereon.

For that reason, imposing a duty upon Appellants on the putative ground that "a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees" is simply mistaken. See Court of Appeals' decision (43a), citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 502 (1988). Having exclusive legal possession and control of the demised premises for the term of the leasehold, tenants are not subject to the proprietor's retention of control and right of access as in the merchant-invitee relationship. See *Grant, supra*; *Ann Arbor Tenants Union, supra*. So despite the fact that tenants are considered invitees of a landlord, they are legally different and in a stronger position than invitees in a merchant relationship when it comes to criminal acts committed on the premises. Simply put, invitees are not all equal under the law. Consequently, unlike the invitees in *MacDonald*, it was the tenants here who effectively had control over the "common outdoor area" in question and who were in the best position to respond to the criminal acts of the third party by calling the police. Thus, there is no warrant to impose even a limited duty upon Appellants to

call the police, especially where they had no duty to provide security at the premises in the first place. To hold otherwise would require Appellants to be insurers of their tenants' safety where the tenants and their guests were in a better position to protect themselves from the third-party's criminal acts.[4]

CONCLUSION AND RELIEF

Based upon the foregoing, this Court should REVERSE the Court of Appeals' decision and reinstate the trial court's order granting Defendants-Appellants/Cross-Appellees Evergreen and Radney's motion for summary disposition under MCR 2.116(C)(8).

Respectfully Submitted,

By: _____
Gary P. Supanich (P45547)
Attorney for Defendants-Appellants/
Cross-Appellees Evergreen and Radney
117 North First Street, Suite 111
Ann Arbor, MI 48104
(734) 276-6561

Dated: October 23, 2012

[4] This Court's recent decision in *Hill v Sears, Roebuck & Co,* Docket Nos. 143329, No. 143348, No. 143633, dec'd August 16, 2012, fully supports Appellants' position that no duty should be imposed, absent special circumstances not present here. In *Hill*, this Court, after quoting *Williams, supra,* 429 Mich at 499, refused to "impose a duty on such an installer to act for the benefit of the homeowners or occupiers in regard to hazards created by third parties," where the installation "occurred in the *plaintiffs' home*, which is quintessentially the place where plaintiffs are most in control and 'best able to provide a place of safety' for themselves," and where "'there is no duty to warn someone of a risk of which that person is aware.'" (Slip op pp 15 n1, 16, 18)(Citations omitted; emphasis in original). As in *Hill*, there is an insufficient basis to impose a duty upon Appellants because they did not exercise control over the security of the area where Defendant Schaaf's criminal acts occurred and because the tenants were in the best position to alert the police about his threatening criminal presence.