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' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

APPENDIX –SEPARATELY BOUND

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STATEMENT OF THE BASIS OF JURISDICTION

This appeal stems from the imposition of vicarious liability upon Defendants-Appellants Evergreen Regency Townhomes, Ltd. ("Evergreen") and Radney Management & Investments ("Radney"), a residential landlord and its management company, when Plaintiff-Appellee Devon Scott Bailey ("Plaintiff" or "Bailey"), a guest of one of their tenants, was seriously injured on the leased premises by the criminal acts of a third-party, Defendant Steven Gerome Schaaf ("Schaaf"). On November 9, 2007, Plaintiff filed a Complaint against T.J. Realty, Inc., d/b/a Hi-Tech Protection ("Hi-Tech") and its president, Timothy Johnson ("Johnson"), and later amended the Complaint to add two of the company's security guards, Captain William Boyd Baker ("Baker") and Christopher Lee Campbell "(Campbell"). Plaintiff then filed a Second Amended Complaint on May 23, 2008, adding Defendants Evergreen and Radney. (1a-20a).

The first eight counts of Plaintiff's Second Amended Complaint were negligence claims, with Count IX being a breach of contract claim against Hi-Tech, Evergreen and Radney. On February 6, 2009, Defendants (except Schaaf) moved for partial summary disposition as to Counts I-VIII of Plaintiff's Second Amended Complaint. The defense position was that the individuals named in the Complaint – Campbell, Baker and Johnson – owed no legal duties to Plaintiff; that Evergreen owed no duty to maintain security guards and did not voluntarily assume any duties to Plaintiff by retaining security guards; and that Hi-Tech had no relationship with Plaintiff upon which a duty could be premised, nor could it have

any derivative liability through Evergreen because Evergreen owed no duty to Plaintiff. At the motion hearing, the claims against the individual Defendants Johnson, Baker and Campbell were dismissed. After the hearing, the trial court granted Defendants' motion for partial summary disposition on May 13, 2009 as to Counts I-VIII of Plaintiff's Second Amended Complaint. (21a-23a). On December 14, 2009, the trial court granted Defendants Evergreen, Radney and Hi-Tech's motion for summary disposition as to Count IX of Plaintiff's Complaint. (24a-25a). Plaintiff then appealed.

In a published per curiam opinion issued on August 18, 2011, the Court of Appeals (Beckering, P.J. and Whitbeck and M.J. Kelly, JJ), affirmed the trial court's dismissal of Counts I-VII and IX, but reversed as to Count VIII, the vicarious liability claim as to Evergreen and Radney. (26a-45a). Extending the principles of *MacDonald v PKT, Inc,* 464 Mich 322 (2001) to the landlord-tenant context, the Court of Appeals held that "as premises proprietors, Evergreen and Radney, clearly had a duty to "respond[] reasonably to situations occurring on the premises," which included a duty "to call the police when required." (43a).

On November 10, 2011, Defendants-Appellants Evergreen and Radney filed a timely Application for Leave to Appeal in this Court pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(c). In an Order entered on May 23, 2012, this Court granted their Application. (46a). Pursuant to Mich Const 1963, Art VI, § 4, MCL 600.212, MCL 600.215(3), and MCR 7.301(A)(2), jurisdiction is fully vested in this Court to hear and resolve all issues presented in this appeal.

STATEMENT OF THE QUESTIONS FOR REVIEW

I. SHOULD THIS COURT EXTEND THE PRINCIPLES OF *MacDonald v PKT, Inc*, 464 MICH 322 (2001) TO LANDLORDS AND THEIR PROPERTY MANAGEMENT COMPANIES BY IMPOSING A DUTY UPON THEM TO CALL THE POLICE WHEN THE CRIMINAL ACTS OF A THIRD PARTY ENDANGER IDENTIFIABLE INVITEES ON THE LEASED PREMISES?

Plaintiff-Appellee will answer: "Yes"

Defendants-Appellants answer: "No"

This Court should answer: "No"

II. ASSUMING *ARGUENDO* THAT THE PRINCIPLES OF *MacDonald* ARE EXTENDED TO LANDLORDS AND THEIR PROPERTY MANAGEMENT COMPANIES, DID THE COURT OF APPEALS ERR BY IMPOSING VICARIOUS LIABILITY UPON EVERGREEN OR RADNEY BECAUSE THEY DID NOT HAVE ACTUAL NOTICE OF THE THIRD PARTY'S THREATENING CRIMINAL PRESENCE SO AS TO REASONABLY RESPOND TO IT SINCE HI-TECH'S SECURITY GUARDS BAKER AND CAMPBELL WERE NOT THEIR AGENTS?

Plaintiff-Appellee will answer: "No"

Defendants-Appellants answer: "Yes"

This Court should answer: "Yes"

III. EVEN ASSUMING *ARGUENDO* THAT HI-TECH'S SECURITY GUARDS BAKER AND CAMPBELL WERE AGENTS OF EVERGREEN OR RADNEY FOR THE PURPOSE OF IMPOSING VICARIOUS LIABILITY, DID THE COURT OF APPEALS ERR BECAUSE PLAINTIFF CANNOT SHOW THAT BAKER AND CAMPBELL BREACHED A DUTY TO CALL THE POLICE OR THAT THEIR ALLEGED BREACH OF DUTY CAUSED HIS INJURIES?

Plaintiff-Appellee will answer:	"No"
Defendants-Appellants answer:	"Yes"
This Court should answer:	"Yes"

IV. EVEN ASSUMING *ARGUENDO* THAT PLAINTIFF'S INJURIES WERE CAUSED BY HI-TECH'S SECURITY GUARDS BAKER AND CAMPBELL'S ALLEGED BREACH OF DUTY TO CALL THE POLICE, DID THE COURT OF APPEALS ERR BECAUSE EVERGREEN AND RADNEY CANNOT BE VICARIOUSLY LIABLE FOR THE IMPUTED NEGLIGENCE OF BAKER AND CAMPBELL SINCE PLAINTIFF VOLUNTARILY DISMISSED THE INDIVIDUAL NEGLIGENCE CLAIMS AGAINST THEM?

Plaintiff-Appellee will answer:	"No"
Defendants-Appellants answer:	"Yes"
This Court should answer:	"Yes"

STATEMENT OF FACTS

Defendant Evergreen owns a large apartment complex in Flint, Michigan; Defendant Radney is the managing agent for Evergreen at its Flint apartment complex; Defendant Hi-Tech contracted with Evergreen to provide security at the Flint apartment complex; Defendant Johnson is the President of Hi-Tech and owner of T;J. Realty Inc; Defendants Baker and Campbell were employed as security guards by Hi-Tech. In the late evening hours of August 4, 2006, Plaintiff was shot and injured by Defendant Schaaf at the apartment complex. Plaintiff filed a Complaint on November 9, 2007 against Hi-Tech and its president, Johnson, and later amended the Complaint adding the two security guards Baker and Campbell. On May 23, 2008, Plaintiff filed a Second Amended Complaint adding Evergreen and Radney as Defendants. (1a-20a).

As alleged in Plaintiff's Second Amended Complaint, "Plaintiff was visiting at the home of his brother, and barbequing with friends as an invitee at the Evergreen Regency Townhouses, 3101 Deer Lane, Flint." (4a, ¶ 13). According to Plaintiff, tenant Laura Green informed Hi-Tech security personnel Baker and Campbell that "Schaaf, who was not a tenant or a guest, was on the Premises in a common outdoor area," had a gun and was making threats to shoot people. (4a, ¶¶ 14-15).[1] Plaintiff alleges that "[a]fter Laura Green pointed out Schaaf as the person with a gun, threatening to shoot people, Baker and Campbell failed to take any action." (4a, ¶

[1] Contrary to Plaintiff's allegation, it appears that Schaaf was on the premises as a guest of one of the tenants. Nevertheless, for the purposes of this appeal, Defendants accept the pleading as true pursuant to MCR 2.116(C)(8).

16). Plaintiff further alleges that "although many residents notified the local police authorities of Schaaf's dangerous presence, neither Baker nor Campbell notified any police authorities of Schaaf's dangerous presence, despite an ability and a duty to do so." (4a, ¶ 19). According to Plaintiff, "[w]ithin moments of when Baker and Campbell were notified by Laura [Green], Schaaf began to fire the weapon," shooting Plaintiff in the back. (5a, ¶¶ 20-22). In his Second Amended Complaint, Plaintiff alleged nine claims: (1) Premises Liability against Evergreen; (2) Negligent Hiring, Supervision and Retention against Evergreen; (3) Negligent Hiring, Supervision and Retention against Radney; (4) Negligent Hiring, Supervision and Retention against T.J. Realty/Hi-Tech and Johnson; (5) Ordinary Negligence as to each Defendant; (6) Negligence as to each Defendant; (7) Vicarious Liability as to T.J. Realty/Hi-Tech; (8) Vicarious Liability as to Evergreen and Radney; and (9) Breach of Contract as to Evergreen, Radney and Hi-Tech. (5a-19a).

Defense counsel, Mr. Thomas Keenan, answered for Defendants except Schaaf, denying all the claims alleged in Plaintiff's Second Amended Complaint. On February 6, 2009, Defendants (except Schaaf) moved for partial summary disposition under MCR 2.116(C)(8) as to Counts I-VIII, claiming that Campbell, Baker and Johnson, as individuals, owed no legal duties to Plaintiff; that Evergreen owed no duty to maintain security guards and did not voluntarily assume any duties to Plaintiff by the retention of security guards; and that Hi-Tech had no relationship with Plaintiff upon which a duty could be premised and could not have derivative liability through Evergreen as Evergreen owed no duty to Plaintiff. On

March 2, 2009, Plaintiff moved for partial summary disposition under MCR 2.116(C)(10) as to Count IX, the third-party beneficiary contract claim against Evergreen, Radney and Hi-Tech. In their response to Plaintiff's motion, Defendants asked for partial summary disposition under MCR 2.116(I)(2), claiming that they owed no duty to Plaintiff under the contract.

The trial court heard arguments on the motions on March 23, 2009. The trial court determined that it would dismiss the individual Defendants (Johnson, Baker and Campbell), as Plaintiff failed to argue any basis for holding them individually liable. The trial court also concluded that Evergreen and Radney were entitled to dismissal because a landlord does not have a duty to provide security guards, but even the voluntary provision of security guards does not give rise to liability. Thus, the trial court granted Defendants' motion for partial summary disposition as to Counts I-VIII under MCR 2.116(C)(8). (21a-23a). On December 14, 2009, the trial court also granted Defendants' motion for partial summary disposition as to Count IX and entered a default judgment against Schaaf, which was designated as the final order. (24a-25a). Plaintiff then filed a timely claim of appeal against Evergreen, Radney and Hi-Tech, expressly declining to appeal the dismissal of the claims against the individual Defendants, Johnson, Baker and Campbell.

In a published per curiam opinion issued on August 18, 2011, the Court of Appeals (Beckering, P.J. and Whitbeck and M.J. Kelly, JJ), affirmed the trial court's dismissal of Counts I-VII and IX, reversing only as to Count VIII, the vicarious liability claim as to Evergreen and Radney. (26a-45a). Specifically, the Court of

Appeals held that the trial court erred when it concluded that Plaintiff had failed to state a claim under MCR 2.116(C)(8) against Evergreen and Radney because the landlord had a duty to call the police under the circumstances. In reversing the dismissal of vicarious liability claim against Evergreen and Radney, the Court of Appeals stated the following:

> D. RECONCILING DUTIES OF MERCHANTS AND LANDLORDS
>
> In reconciling the preceding decisions, we must address a critical question: does the *Williams/Scott/Mason/MacDonald* line of cases – that deal, respectively, with the owners of a drug store, a nightclub and two bars, and a large entertainment venue – even apply in the apartment complex circumstances?
>
> To our knowledge, this is an issue of first impression. Notably, in *Scott*, the Supreme Court referred to *Holland v Leidel*, a case involving a tenant who was assaulted in the parking lot of her apartment building. But it then specifically limited the principles that it enunciated in that case, stating, "We reserve our opinion regarding the application, in the case of landlord-tenant law, of the principles discussed in the present case."
>
> Because this issue involves the propriety of the trial court's decision to dismiss Bailey's claims under MCR 2.118(C)(8), we limit our analysis to a discussion of the basic facts that Bailey sets out in his pleadings. We express no opinion as to whether Evergreen or Radney might be able to show – through evidentiary submissions – that one or the other was not the premises possessor for purposes of premises liability.
>
> In his second amended complaint, Bailey alleged that Green informed Baker and Campbell that Schaaf had a gun and was threatening to shoot people. Green even pointed at Schaaf, who was visible to Baker and Campbell along with the people in Schaaf's vicinity, which included Bailey. Bailey further alleged that, Baker and Campbell did nothing in response. Finally, Bailey alleged that Baker and Campbell were, at all relevant times, acting within the scope of their employment or agency with Evergreen and Radney. Based on these alleged facts, Bailey claimed that Evergreen and Radney breached their duty of care to him as the guest of an Evergreen tenant. Bailey's claim implicated a landlord's general duty to take reasonable steps to protect his or her invitees from criminal acts within its common areas. But it also arguably implicated a merchant's duty to involve

the police when the criminal acts of a third party endanger a readily identifiable invitee. We disagree that the former applies, but adopt the latter as applying under the circumstances.

Bailey alleged that Schaaf was "on the premises in a common outdoor area" threatening to shoot someone. Thus, this case clearly does not involve a condition *on the land* that placed Bailey at a heightened risk of harm at the hands of third parties. As such, to the extent that Bailey alleged that Evergreen and Radney had a general duty to protect him from the criminal acts of third-parties simply because this outdoor common area was on the premises *as a condition on the land*, he necessarily failed to state a claim. A premises possessor has no such duty. Further, although Evergreen voluntarily provided security guards, Evergreen cannot be liable for voluntarily undertaking additional security precautions even though the additional precautions ultimately fail to prevent criminal activity on its premises.

Turning to a merchant's duty to involve the police, we believe that the limited duty that *MacDonald* imposes on merchants must necessarily apply to landlords in light of a landlord's closer relationship to its tenants and guests. As *Williams* noted, "[A] landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees." If a merchant – with lesser ability or responsibility to control or protect its invitees than a landlord – is nevertheless required to take reasonable efforts to contact the police in response to a situation presently occurring on the premises that poses an imminent risk of harm to identifiable invitees, then surely it is logical to hold a landlord, who is in a relationship of higher control, to the same standard.

Thus, extending the *MacDonald* principles, as premises proprietors, Evergreen and Radney, clearly had a duty to "respond[] reasonably to situations occurring on the premises," which included a duty "to call the police when required." Although Baker and Campbell were not employees of Evergreen or Radney, Bailey did allege that Baker and Campbell were agents of Evergreen or Radney for purposes of responding to safety issues. If Baker and Campbell were serving as agents of Evergreen and Radney, once Green identified a criminal threat to an identifiable class of invitees, Baker and Campbell had a duty to involve the police on behalf of Evergreen and Radney. As such, reading Bailey's allegations as a whole and taking them as true, we conclude that Bailey stated a claim as to Evergreen and Radney premised on the failure of their agents to respond appropriately to criminal activities on their principal's property.

> In sum, we conclude that the trial court did not err to the extent that it dismissed Bailey's claims premised on a duty of Evergreen or Radney to provide security or otherwise make the premises safe from criminal activity. But, applying *MacDonald*, we conclude that the trial court erred to the extent that it determined that Bailey did not state a claim that Evergreen and Radney failed to respond properly – through their agents – to the imminent threat that Schaaf posed to lawful invitees. Evergreen or Radney had the duty to call the police once they had knowledge of an ongoing emergency that posed a foreseeable risk of imminent harm to an identifiable invitee or class of invitees. (42a-44a)

Defendants-Appellants/Cross-Appellees Evergreen and Radney now appeal from this decision.

SUMMARY OF THE ARGUMENT

The principles stated in *MacDonald* imposing a duty on the premises owner to call the police to report the criminal acts of third parties threatening identifiable invitees on the premises should not be extended to residential landlords. Here, the Court of Appeals erred in extending *MacDonald* because Defendants Evergreen and Radney did not have both possession and control of the leased premises where the criminal acts of the third party allegedly occurred. Further, the tenants had more control than Evergreen and Radney in responding to the criminal acts of the third party on the leased premises. Finally, policy considerations favor the adoption of a no-duty rule, absent special circumstances, when the criminal acts of a third party threaten identifiable invitees on the leased premises. As such, this case should be treated as though it were a rescue case where the no-duty rule is applicable since tenants are typically in the best position to call the police. Accordingly, there is no need to extend *MacDonald* to the landlord-tenant context.

But even if the principles of *MacDonald* were applicable here, the Court of Appeals erred because the security guards Baker and Campbell, who allegedly failed to call the police, were agents and/or employees of Hi-Tech, an independent contractor. In any case, Plaintiff cannot show that Baker and Campbell breached their duty by failing to call the police or that their alleged breach of duty caused his injuries. Finally, Evergreen and Radney cannot be vicariously liable for imputed negligence of Baker and Campbell in failing to call the police because Plaintiff voluntarily dismissed his claims against them.

ARGUMENT

I. THIS COURT SHOULD NOT EXTEND THE PRINCIPLES OF *MacDonald v PKT, Inc*, 464 MICH 322 (2001) TO LANDLORDS AND THEIR PROPERTY MANAGEMENT COMPANIES BY IMPOSING A DUTY UPON THEM TO CALL THE POLICE WHEN THE CRIMINAL ACTS OF A THIRD PARTY ENDANGER IDENTIFIABLE INVITEES ON THE LEASED PREMISES.

A. Standards of Appellate Review

Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim upon which relief can be granted. MCR 2.116(C)(8); *Horace v City of Pontiac*, 456 Mich 744, 749 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based upon the pleadings alone and may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129 (2001); *Patterson v Kleiman*, 447 Mich 429, 432 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the fact, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). A motion for summary disposition under MCR 2.116(C)(8) should be granted when the claim is unenforceable as a matter of law that no factual development could justify recovery. *Id.* The grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253 (1997).

Whether a duty exists is a question of law for this Court. *Beaudrie, supra*, 465 Mich at 130. As Justice Levin explained in his dissenting opinion in *Samson v Saginaw Professional Building*, 393 Mich 393, 418-420 (1975):

> Duty is one of the concepts courts employ to confine the limits of negligence liability. The question of "duty" in a particular case is one of law for the court. Inevitably, regardless of the court's analysis, the duty question turns on policy considerations: "whether one owes a duty of protection to another is ultimately a question of fairness." (Footnotes omitted).
>
> In *Elbert v Saginaw*, 363 Mich 463, 476; 109 NW2d 879 (1961), Justice Talbot Smith said:
>
> > "[T]he problem of duty is simply the problem of the degree to which one's uncontrolled and undisciplined activities will be curtailed by the courts in recognition of the needs of organized society. . . It involves, as we have seen, much of legal history, of precedent, of allocations of risk and loss. . . .
>
> While the above analysis [of the majority] is not inaccurate, it is incomplete. Negligence analysis limited to the question of foreseeability ignores the vital policy questions presented in this case.
>
> ***
>
> > "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." (Emphasis in original.) *Goldberg v Housing Authority of Newark*, 38 NJ 578, 583; 186 A2d 291, 293; 10 ALR3d 595, 601 (1962).

In the absence of some "special relationship" or circumstances, one party generally does not have a duty to aid or protect another person. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499 (1988). A generally recognized special relationship includes the landlord-tenant relationship. *Murdock v Higgins*, 454 Mich 46, 55 n 11 (1997). Here, the scope and extent of the duty to protect against the criminal acts of third parties is essentially a question of public policy, and is premised upon the defendant having control as to be in the best position to provide safety. *Williams, supra,* 429 Mich at 499.

B. Legal Discussion

Before addressing the question whether the principles stated in *MacDonald* should be extended to residential landlords and their property management companies, some stage setting is necessary as a backdrop to the issue under consideration. As a matter of well-settled property law in Michigan, tenants and social guests of tenants are considered invitees of a landlord. *Benton v Dart Properties, Inc*, 270 Mich App 437, 440 (2006); *Stanley v Town Square Co-op*, 203 Mich App 143, 147-148 (1993). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). However, in a premises liability action where a landlord leases property to a tenant, the landlord surrenders possession of the leasehold and holds only a reversionary interest, retaining only the duty to maintain portions of the leasehold still under the landlord's control. *Williams v Detroit*, 127 Mich App 464, 468 (1983). Thus, the landlord's responsibility is to ensure that the common areas under the landlord's possession and control are kept in good repair and reasonably safe for the use of tenants, their guests and other invitees. MCL 554.139; *Allison v AEW Capital Management, LLP*, 481 Mich 419, 427-428 (2008) This includes the duty to take reasonable security measures to protect others from

unreasonable risks of physical harm resulting from criminal acts of third parties on the premises. See *Samson, supra; Johnston v Harris*, 387 Mich 569 (1972).[2]

As for merchants, it is well-established that as landowners they do not have a duty to provide security guards to protect their customers from the criminal acts of third persons. *Williams, supra,* 429 Mich at 499. However, if a merchant voluntarily provides security guards, then there is a duty to respond that is "limited to reasonably expediting the involvement of the police and that there is no duty to otherwise anticipate and prevent the criminal acts of third parties." *MacDonald, supra*, 464 Mich at 322. As *McDonald* noted, criminal acts, by their very nature, are unforeseeable. *Id*. at 335.

(1) The *MacDonald* Decision

MacDonald consists of consolidated cases involving lawsuits brought by patrons of Pine Knob Music Theater for injuries they sustained during sod-throwing incidents while attending concerts there. *Id*. at 325. Both plaintiffs alleged that the sod-throwing incidents were foreseeable and Pine Knob failed to provide adequate security to protect its patrons from the dangers posed by them. *Id*. at 325-326.

[2] In *Johnston*, this Court, reversing the Court of Appeals' decision that the plaintiff could not establish proximate causation, held that the landlord was subject to tort liability for a criminal assault on a tenant who was entering the premises in a "high crime district" where "it is reasonably foreseeable that inadequate lighting and unlocked doors would create conditions which criminals would be attracted to carry out their nefarious deeds." 387 Mich 573. Applying the reasoning in *Johnston*, *Samson* held that the landlord was liable for injuries suffered by a tenant's employee who was assaulted by an outpatient of a state mental health clinic, which was a tenant in the building. 393 Mich at 393. In the course of reversing the Court of Appeals' decision in this case, this Court needs to repudiate both *Johnston* and *Samson* as badly reasoned decisions.

Nevertheless, this Court held that "[i]t is only a present situation on the premises, not any past incidents, that creates a duty to respond." *Id*. at 335. Applying this rule, this Court held that Pine Knob fulfilled its obligation to the plaintiffs by "having police present once the sod-throwing began." *Id*. at 339-340.

In a direct response to the dissent, the majority in *MacDonald* soundly rejected as a matter of policy a rule that would "unfairly expose merchants in high-crime areas to excessive tort liability and increase the pressure on commercial enterprises to remove themselves from our troubled urban and high-crime communities." *Id*. at 341. As this Court recognized, avoiding the imposition of this kind of liability was one of the primary policy concerns that motivated this Court to adopt the principles stated in *Williams* and *Scott v Harper Recreations*, 444 Mich 441 (1993), given that businesses in many urban communities "could not bear the heavy insurance burden which would be required to protect against this extraordinary kind of liability." *Id*. at 344-345. Thus, while *MacDonald* rejected the imposition of any duty that would essentially require business owners, particularly those operating in high-crime areas, to provide police protection to their patrons, this Court nonetheless continued to hold that if merchants voluntarily provide security guards, they only have a duty to reasonably respond when such incidents occur.

(2) The Court of Appeals' Decision to Extend *MacDonald*

In this case, the Court of Appeals extended the principles applicable in the merchant context to landlords presumably because merchants and landlords are

"premises proprietors." (43a). Thus, the Court of Appeals asserted that "we believe that the limited duty that *MacDonald* imposes on merchants must necessarily apply to landlords in light of a landlord's closer relationship to its tenants and their guests." (43a). The Court of Appeals based this belief on *Williams*, 429 Mich at 502 n 17, which noted that "a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees." (43a). For that reason, the Court of Appeals concluded that "surely it is logical to hold a landlord, who is in a relationship of higher control, to the same standard." (*Id*.)

(3) <u>Evergreen and Radney Did Not Retain Both Possession and Control over the Leased Premises Where the Criminal Acts of the Third Party Allegedly Occurred</u>

Even though both merchants and landlords are premises owners, it is vital to recognize that premises liability is conditioned upon the presence of both possession of *and* control over the premises. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660 (1998). This is true because liability for injuries due to defective premises ordinarily depends upon the power to prevent such injuries, which rests primarily upon having both possession and control of the premises. *Merritt v Nickelson*, 407 Mich 544 (1980). Under current Michigan law, a landlord also owes a duty to tenants and their guests to protect them from unreasonable risks resulting from foreseeable activities occurring within the common areas of the landlord's premises,

including risks from foreseeable criminal activities. *Stanley, supra.*[3] At this Court noted in *Allison*,

> Black's Law Dictionary (6th ed), p 275, defines "common area" as: in law of landlord-tenant, the portion of demised premises used in common by tenants over which landlord retains control (*e.g*. hallways, stairs) and hence for whose condition he is liable, as contrasted with areas of which tenant has exclusive possession. This definition is in accord with the plain and ordinary meaning of the term. "Common" is defined as "belonging equally to, or shared alike by, two or more or all in question[.]" *Random House Webster's College Dictionary* (1997). Therefore, in the context of leased residential property, "common areas" describes those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants. A lessor's duties regarding these areas arise from the control the lessor retains over them. See, e.g., *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 499; 418 NW2d 381 (1988) (stating that "a landlord may be held liable for an unreasonable risk of harm caused by a dangerous condition in the areas of common use retained in his control such as lobbies, hallways, stairways, and elevators"). [481 Mich at 427].

As *Williams* explained, landlords are liable for "a dangerous condition exist[ing] in the *common areas* of a building <u>*which tenants must necessarily use*</u>" to access their apartments. *Williams*, 429 Mich at 502 n 17 (Emphasis added).[4] Thus,

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[3] In light of the decisions in *Williams* and *MacDonald* that a merchant's duty of reasonable care to protect business invitees from unreasonable risk of harm caused by dangerous conditions on the property does not extend to the criminal acts of third parties, it would appear that landlords are being held to a different, more demanding standard at the current time under Michigan law since they have a duty to tenants and their guests to protect them from the risks of *foreseeable* criminal activities of third parties. It is the defense position that, absent special circumstances, no duty should be imposed upon landlords and their management companies to protect their tenants and guests from the risks of *unforeseeable* criminal acts of third parties on the leased premises.

[4] This is also reflected in *Restatement of Property,* 2d, Landlord & Tenant, § 17.3, Harm to Persons on Property, p 197, which provides:

> (l). *Criminal Intrusion.* For the purpose of this section, the unreasonable risk of harm from criminal intrusion constitutes a dangerous condition, so that where the landlord could by the exercise of reasonable care

Williams remarked that *Samson* "upheld a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building, noting that the landlord's duty may be *slight*." *Id.* (Emphasis added.); see also *Restatement of Property,* 2d, Landlord & Tenant § 5.5 comment c., illus. 4, 5.

Because a residential landlord's duties regarding common areas arise from the possession and control the lessor retains over them, a duty is imposed on landlords precisely because they are "best able to provide a place of safety." *Williams, supra* at 499. However, the rationale for imposing a duty upon landlords to protect tenants and their guests from criminal acts of a third-party is diminished to the extent that either possession of or control over the premises is lacking. Thus, a landlord's duty to his tenants and guests does not extend to protecting them from a third-party's criminal acts occurring in an area over which the landlord does not exercise both possession and control. *Samson, supra* at 407 ("Whether or not the

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> have discovered the unreasonable risk of criminal intrusion and could have made the condition safe from such unreasonable risk of criminal intrusion, he is subject to liability for physical harm caused by criminal intrusion if he has not taken the necessary precautions. As regards parts of the property retained in the landlord's control, common entranceways, fire escapes, halls and other approaches to the leased property are included. In addition, other parts of the property, such as door locks on the entrance to the tenant's apartment or office, may be effectively retained in the landlord's control in the sense that the landlord is the only one with the authority to make necessary changes in order to avoid unreasonable risk of harm.

See also *Commonwealth v Nelson*, 74 Mass App Ct 629; 909 NE2d 42 (2009) ("A residential tenancy carries with it a limited easement through the common areas for purposes of permitting a tenant's invited guests access and egress from the apartment.")(citing *Commonwealth v Richardson,* 313 Mass 632, 639; 48 NE2d 678 (1943)).

landlord retains any responsibility for actions which occur within the confines of the now leased premises is not now before this Court and need not be answered. It would appear, however, that he would not retain any responsibility for such actions, except in the most unusual circumstances.")

That is the case here. As Plaintiff alleges in his Second Amended Complaint, "Schaaf . . . was on the Premises in a common outdoor area," making threats to shoot people. (4a, ¶¶ 14-15). However, there was no specific allegation in Plaintiff's Second Amended Complaint that Schaaf was in a common area, as legally defined, that a tenant or guest "*must necessarily use*" to access their apartments. *Allison, supra; Williams, supra* at 502 n 17 (emphasis added). Thus, unlike common areas that must necessarily be used by tenants and their guests to access the tenants' apartments, such as enclosed hallways or staircases, which are under the landlord's control, the "common outdoor area" at issue here – an outside grilling area that was open and accessible to the public – did not have to be used by the tenants or their guests to access the tenants' apartments. To that extent, it was *not* a common area under the landlord's control. Indeed, the "common outdoor area" in question had the features of an open public forum, such as a street or park, which anyone lawfully on the premises could use. Accordingly, because the "common outdoor area" where the criminal acts of the third party allegedly occurred in this case was not an area that was under both the possession *and* control of Evergreen and Radney, it necessarily follows that Evergreen and Radney did not have a duty to protect the tenants and their guests from Schaaf's criminal acts occurring on the

leased premises. See *Williams, supra*, 127 Mich App at 470-71 (noting that "plaintiff was injured in an area over which defendant's tenant had exclusive possession and control," and thus "defendant should not be liable unless defendant exercised control over the security of the leased premises.").

Consequently, the facts and circumstances of this case contrast with those of *MacDonald*, where the premises owner retained possession of and control over the premises on which the incident occurred. Thus, *MacDonald* held that if merchants voluntarily provide security guards, they have a duty only to reasonably respond when such incidents occur. Here, Evergreen and Radney did not retain both possession and control of the area in which the criminal acts of Schaaf allegedly occurred. Accordingly, there is no basis to extend *MacDonald* by requiring them to call the police to report the third party's threatening criminal presence to identifiable invitees.

This case is also distinguishable from *MacDonald* in another fundamental respect. For unlike *MacDonald*, there was no indication that the tenants and their guests entrusted themselves to the control and protection of Evergreen and Radney, with a consequent loss of control to protect themselves in response to the threats posed by the third party on the leased premises. See *Williams, supra* at 499. Rather, as borne out by the fact that many residents had already called the police to report Schaaf's threatening criminal behavior, it is clear that, under the circumstances, the tenants and their guests were in the best position to protect themselves against the imminent danger being presented. Thus, given that

Evergreen and Radney did not have both possession and control of the area where the third-party's criminal acts allegedly occurred, there is no basis for imposing a duty upon Evergreen and Radney to call the police, as required by *MacDonald*.

(4) <u>The Court of Appeals Erred Because the Tenants and Their Guests Had More Control than Evergreen and Radney in Responding to the Criminal Acts of the Third Party on the Leased Premises</u>

In determining that the principles of *MacDonald* should apply to landlords, the Court of Appeals relied upon *Williams*' observation that "a landlord has more control in his relationship to tenants and their guests than does a merchant in his relationship with his invitees," with regard to "a dangerous condition existing in common areas of a building which tenants must necessarily use." (43a). But contrary to the Court of Appeals' reasoning, it is simply not true that Evergreen and Radney had more control than their tenants and guests regarding a response to Schaaf's criminal acts on the leased premises.

In reaching its conclusion, the Court of Appeals failed to recognize the legal significance of the difference between a situation involving physical defects on the premises, where a landlord typically has more control than the tenants in protecting them, their guests and other invitees from an imminent risk of harm, and the facts and circumstances of the present case involving criminal acts of a third party on the premises where such control is not present. Although the Court of Appeals recognized that "this case does not involve a condition *on the land* that placed Bailey at a heightened risk of harm at the hands of third parties [sic]," it failed to extract the proper legal significance from this fact. (43a) (emphasis in

original). Specifically, this case does not involve physical defects on the premises, where the landlord has both possession and control, but rather the unpredictable, unforeseeable criminal acts of a third party in an outdoor area open and accessible to the public that the tenants did not necessarily have to use to access their apartments. Accordingly, it was wrong to presume as a matter of law, as the Court of Appeals did, that the landlord had more control over the area at issue than the tenants or their guests simply by virtue of their formal legal relationship. Indeed, the exact opposite is true here, for it was the tenants and their guests themselves who had more control than Evergreen and Radney or Hi-Tech's security guards over the leased premises in responding to the third-party's criminal acts. Given that the landlord did not have more control over the leased premises in question than its tenants and guests, the Court of Appeals thus clearly erred in holding that Evergreen and Radney are subject to the *McDonald* principles with a duty "to call the police when required." Instead, no duty should be imposed upon them, absent special circumstances not present here.

(5) Policy Considerations Favor the No-Duty Rule Absent Special Circumstances

Ultimately, whether to extend the *MacDonald* rule to residential landlords and their property management companies comes down to social policy considerations. As Justice Levin recognized in his dissenting opinion in *Samson,* this "is ultimately a question of fairness," which requires the "weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."

As it stands now, residential landlords, like merchants, do not have a duty to provide armed, visible security guards to deter criminal acts of third parties. *MacDonald, supra* at 336 (citing *Williams*, 429 Mich at 501). As *Williams* noted,

> [I]mposing the duty advanced by plaintiffs is against the public interest. The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to the business owner. . . . To shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy. [429 Mich at 501-502, 503-504].

While landlords do not have a duty to provide security guards, they, like merchants, may voluntarily assume the duty. The Court of Appeals' decision to extend the *MacDonald* rule, however, only makes it more likely than not that residential landlords will provide *no* security at all so as to avoid the possibility of liability attaching to them for the criminal acts of third parties on the leased premises. This is particularly true of residential landlords in high-crime neighborhoods whose residential complexes are openly accessible to the public, such as here.

Further, it should be well understood by now that extending the *MacDonald* rule to residential landlords would have profound ramifications. As Justice T.E. Brennan recognized in his dissenting opinion in *Johnston*: "Public safety is the business of government." 387 Mich at 576. Here, as in *Johnston*, it would be a mistake to "extend[] the rule of tort law too far" by making a residential landlord liable for the criminal acts of a third-party, particularly in "high crime areas." As Justice Brennan presciently warned over 40 years ago, such a decision effectively "transfers the governmental function of public protection to the unfortunate owners

of real property in such places." *Id* at 576-577. Extending the principles of *MacDonald* to landlords and their property management companies would only repeat that mistake.[5]

At this juncture, it is necessary to point out the obvious parallel to the open and obvious doctrine applicable in premises liability cases. While landowners have a general duty of care to invitees, they are not liable to them for injuries resulting

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[5] As a retrospective review reveals, the origin of this mistake is the flawed decision in *Kline v 1500 Massachusetts Ave Apartment Corp*, 439 F2d 477 (DC Cir 1970). "In fact, prior to 1970, no jurisdiction had imposed liability against a residential landlord based solely upon negligence for injuries sustained by a tenant during a criminal attack on the leased premises." See *2-8B Premises Liability – Law and Practice § 8B.01(1)*(footnote citing law review articles omitted). In *Kline*, the plaintiff was sexually assaulted in a common hallway in an apartment building that had residential and commercial tenants. Over the strong dissenting opinion of Judge MacKinnon, the majority imposed liability on the grounds that the tenant's injury was foreseeable and that she could not adequately protect herself, nor could the police protect her. In pertinent part, the *Kline* Court stated:

> The rationale of the general rule exonerating a third party from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses. The landlord is no insurer of the tenant's safety, but he certainly is no bystander. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants. [439 F2d at 481.]

See R. Weisberg, *Preventing Crime: Private Duties, Public Immunity*, 2 J.L. Econ. & Pol'y 365, 370-73 (2006) (noting that the dissent rightly complained that the landlord was being asked to supply a level of protection in a publicly accessible building "that is not available from the duly constituted government in the locality"). Notwithstanding its specious reasoning, the popularity of *Kline* gave rise to this Court's faulty decision in *Johnston*, whose deficient reasoning was then applied in *Samson*. This Court needs to sweep aside the residual effects of these badly reasoned outcomes.

from open and obvious conditions. The basic duty owed to an invitee by a premises possessor is "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo, supra,* 464 Mich at 516. However, this duty does not generally require a premises possessor to remove open and obvious conditions because, absent special aspects, such conditions are not unreasonably dangerous precisely because they are open and obvious. The underlying rationale for not imposing a duty is that the invitee is in a better position than the premises occupier or landowner to avoid the injury.

Similarly, absent special circumstances, no duty should be imposed upon landlords and their property management companies when it comes to the unpredictable and thus unforeseeable criminal acts of third parties to identifiable invitees on the leased premises. Here, imposing a legal duty upon a landlord "to anticipate and protect against the general hazard of crime in the community," where the landlord did not create the dangerous condition in the first place, would hold the landlord liable for an essentially random, unforeseeable act. *Cf. Stanley, supra*, 203 Mich App 151. It would effectively require the landlord to protect invitees (tenants and their guests) from a danger to which they are exposed in the community at large.

For that reason, a no-duty rule should be adopted, barring special circumstances attendant to the third-party criminal acts on the leased premises, such as when the landlord has actually or affirmatively helped to create the danger

by enhancing the likelihood of exposure to criminal assaults. As this Court pointed out in *Williams*,

> In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff. Thus, as a general rule, there is no duty that obligates one person to aid or protect another. [429 Mich at 498-499].

Because Evergreen and Radney did not create a condition that enhanced the likelihood of a third-party criminal assault, it is thus unreasonable to impose a legal duty upon them to call the police, especially when several tenants or their guests had already done so. Here, the duty of a landlord to protect tenants from criminal activity should arise only when a landlord's negligence facilitates a criminal act and when there is a close or functional connection between the landlord's conduct and the harm suffered. See *Rosenbaum v Security Pacific Corp*, 43 Cal App 4th 1084; 50 Cal Rptr 2d 917 (2d Dist 1996). [6]

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[6] See O. Browder, *The Taming of a Duty – The Tort Liability of Landlords*, 81 Mich L. Rev 99, 101-102 (1982),

> Tort law has always had trouble accommodating the distinction between misfeasance and nonfeasance. It may be argued that, in tort law generally, the distinction is arbitrary, morally indefensible, and sometimes difficult to draw. The fact remains, rightly or wrongly, and generally speaking, that one person has no duty to act affirmatively to protect another person or his property from harm. On must find a special reason in the relationships or circumstances for holding otherwise. This is certainly the problem where one seeks to impose upon landlords a duty respecting the condition of leased premises. An old analogy, however, will be readily perceived: the duty of landowners or possessors of land to protect persons on their land from

Further, as the Court of Appeals recognized, this Court in *Scott, supra*, 444 Mich at 446, declined to extend the principles developed in the merchant context to the landlord context. (42a). In *Scott*, the plaintiff alleged that the security guard failed to keep the premises safe and secure for its patrons, contrary to the defendant's specific representations that it would do so. The plaintiff alleged that the defendant's voluntarily assumed duty was breached by failing to provide adequate security to make the parking lot safe, by failing to implement adequate security procedures to keep the lot free of criminal activity, and by allowing an armed assailant to be present in the parking lot, without any attempts being made by security personnel to prevent or warn of an assault. *Id*. at 450. In *Scott*, this Court dashed the plaintiff's hopes of getting around *Williams* based upon the negligent performance of security guards, holding as follows:

> The present suit is an attempt to circumvent that holding by invoking the principle that a person can be held liable for improperly discharging a voluntarily undertaken function. However, the rule of *Williams* remains in force, even when a merchant voluntarily takes safety precautions. Suit may not be maintained on a theory that the safety measures are less effective than they could or should have been. [*Id*. at 452].

> unreasonable risk of harm. This involves both affirmative and negative duties. The reason obviously was that a person entering another's land is at a considerable disadvantage in protecting himself against such risks, if in fact he can do anything at all about them. Such circumstances arise because the landlord is in control of his land. A tenant, however, is the one who for the most part is in control of the leased premises. It would seem that something special must be found in the relationship of landlord and tenant to justify imposing tort liability on landlords for injuries to tenants resulting from the condition of the leased premises. As we will discover, to impose upon landlords the duty of affirmative action in respect to the condition of premises over which they have no control presents special and peculiar problems. . . .

Extending the *MacDonald* rule to this case would seem to circumvent this Court's policy decision discussed in *Scott,* which noted that "the plaintiff was seeking to avoid the rule of *Williams* by relying on the principle that a person who voluntarily undertakes a responsibility can be held liable if the volunteer's negligence is the proximate cause of the injury." *Scott, supra,* 444 Mich at 441. This conclusion is strengthened here since the facts of this case closely parallel those in *Scott*. As in *Scott*, suit should not be permitted to go forward against Evergreen and Radney for safety precautions that were less effective than they could or should have been. See also *Krass v Joliet*, 233 Mich App 661 (1999) (holding that the landowner and the security company that it hired could not be sued on the theory that the safety precautions were less than effective than they could or should have been when the plaintiff was killed in the parking lot); *Abner v Oakland Mall, Ltd*, 209 Mich App 490 (1995) (precluding recovery against the premises owner and the security company for negligence on the theory that the security service had not prevented a rape).

(a) Tenants and Their Guests Are Typically the "Best Cost-Avoiders" in Responding to the Criminal Acts of Third Parties on the Leased Premises

As a matter of tort law jurisprudence, there are also extremely strong arguments against imposing any legal duty on residential landlords, absent special circumstances, when a third party's criminal acts threaten identifiable invitees on the leased premises. As already indicated, in contrast to invitees in the merchant context, the tenants and their guests typically are in a position of having as much if

not more information than the landlord about the third-party's threatening criminal presence on the premises. That was the case here since the tenants and their guests were in the best position to respond to the threat by calling the police. In the language of tort-law theorists, it is typically the case that the tenants and their guests present at the scene of third-party criminal acts on leased premises are in the position of being the "best-cost avoider." See R. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 2 (1960). So even though tenants (and their guests) are formally considered as invitees of the landlord under Michigan law, they have a strong incentive to protect their own safety and their property interests in their leaseholds, especially when faced with a third party's threatening criminal presence in an area that was shared with the other residents and their guests but not one that tenants must necessarily use to access their apartments. *Williams*, 429 Mich at 502 n 17.

Given the threat posed to their own safety, it is thus unsurprising in this case that many tenants or their guests had already called the police before Hi-Tech's security guards were even notified of Schaaf's presence. This is as it should be, after all, since tenants and their guests clearly had a stake in their own safety and well-being and were in the best position to alert the police about Schaaf's threatening criminal presence, despite the absence of any legal duty requiring them to do so. For that reason alone, there is no need to impose a legal duty upon Evergreen and Radney to do the same.

(b) <u>This Case is Analogous to a Rescue Case Where the No-Duty Rule Applies</u>

When all is said and done, the present case should be treated as though it were functionally equivalent to a rescue case where it is well-settled law that the no-duty rule applies, absent special circumstances. *White v Beasley*, 453 Mich 308, 328 (1996)("Neither police officers nor private citizens have a duty to rescue at common law.")(citing *Williams, supra*, 429 Mich at 498-499 and Prosser & Keeton, Torts (5th ed), § 56, p 373). As Justice Cardozo sententiously put it, "danger invites rescue." *Wagner v International Railway Co*, 133 NE 437 (NY 1921). No legal duty is imposed in rescue cases because courts seek to encourage altruistic behavior on the part of the citizenry. The same is true here: danger invites tenants and their guests to do their civic duty by calling the police whose duty is to prevent criminal attacks. Given the proliferation of cell phones at the present time, this can be easily done by anyone who is in a position to respond. Thus, there is simply no need to impose a tort duty upon landlords, but not their tenants or guests, to fulfill a mere reporting function that can be easily performed by tenants, their guests or anyone else who is passing by the threatening situation. In short, there is simply no rationale for extending the *MacDonald* principles to the landlord-tenant context, especially when doing so would likely cause landlords to withdraw security services, which they have no duty of providing in the first place.

(c) Determining the Level of Protection for Tenants and Their Guests from the Criminal Acts of Third Parties on the Leased Premises Should Not Be a Function of Tort Liability Rules

Since public safety is the business of government and the level of safety in common areas of an apartment complex is a public good, determining the suitable level of protection for tenants and their guests from the criminal acts of third parties should be left to the political process and the contract negotiations between residential landlords and their tenants, unfettered by tort liability rules. As public safety is the business of government, it is the political process that should determine the appropriate level of police protection to be afforded to the public at large and at what cost. At the same time, determining the level of protection being provided at the leased premises is a function of the bargaining between landlords and tenants whereby the costs and benefits for safety are incorporated into the contract as reflected in the rental prices. See K. Hylton, *Symposium: The Internal Point of View in Law and Ethics: III. Torts and Internal Point of View in Legal Theory: Duty in Tort Law: An Economic Approach*, 75 Fordham L. Rev 1501, 1522-1523, 1523 (2006). Determining the level of protection for tenants and their guests from the unforeseeable criminal acts of third parties on leased premises should thus be independent of tort liability rules.

(6) Summary

Based upon the foregoing, this Court should *not* extend the principles in *MacDonald* developed in the merchant-invitee context to apply to residential landlords and their property management companies when a third-party's

threatening criminal presence on the leased premises poses an imminent risk of harm to identifiable invitees. Rather, this Court should embrace a no-duty rule to reflect the general proposition that, absent special circumstances, landlords cannot be made to be the insurer against crime on the leased premises.

II. ASSUMING *ARGUENDO* THAT THE PRINCIPLES OF *MacDonald* ARE EXTENDED TO LANDLORDS AND THEIR PROPERTY MANAGEMENT COMPANIES, THE COURT OF APPEALS ERRED BY IMPOSING VICARIOUS LIABILITY UPON EVERGREEN OR RADNEY BECAUSE THEY DID NOT HAVE ACTUAL NOTICE OF THE THIRD PARTY'S THREATENING CRIMINAL PRESENCE SO AS TO REASONABLY RESPOND TO IT SINCE HI-TECH'S SECURITY GUARDS BAKER AND CAMPBELL WERE NOT THEIR AGENTS.

Extending the principles of *MacDonald* to the present case would also be mistaken since Evergreen and Radney did not have actual notice of the situation occurring on the premises so as to reasonably respond to it. Unlike *MacDonald*, where officials of Pine Knob were immediately put on actual notice of the sod-throwing incident occurring on its premises, Evergreen and Radney did not have any notice of Schaaf's threatening presence on the patio of one of the residents. As already argued, the only notice was provided to Baker and Campbell, who were employees and/or agents of Hi-Tech, an independent contractor. Vicarious liability simply cannot be supported on such a tenuous thread. See *Hamed v Wayne County*, 490 Mich 1 (2011) (finding no vicarious liability when a deputy sheriff sexually assaulted a pretrial detainee in the Wayne County jail).

(1) <u>Hi-Tech's Security Guards Baker and Campbell Were Not Agents or Employees of Evergreen or Radney</u>

But even assuming *arguendo* that Baker and Campbell breached a duty to call the police to report the imminent threat of harm posed by Schaaf, Plaintiff cannot show that Baker or Campbell were agents or employees of Evergreen or Radney so as to impose vicarious liability upon them. In pertinent part, the Court of Appeals, without argument or analysis, simply assumed that Baker and Campbell were agents of Evergreen or Radney based upon Plaintiff's allegations. In pertinent part, the Court of Appeals held:

> *Although Baker and Campbell were not employees of Evergreen or Radney, Bailey did allege that Baker and Campbell were agents of Evergreen or Radney for purposes of responding to safety issues. If Baker and Campbell were serving as agents of Evergreen and Radney*, once Green identified a criminal threat to an identifiable class of invitees, Baker and Campbell had a duty to involve the police on behalf of Evergreen and Radney. As such, reading Bailey's allegations as a whole and taking them as true, we conclude that Bailey stated a claim as to Evergreen and Radney premised on the failure of their agents to respond appropriately to criminal activities on their principal's property. (43a) (Emphasis added.)

The Court of Appeals' analysis is erroneous because nowhere in the Second Amended Complaint does Plaintiff allege that Baker and Campbell were agents of Evergreen and Radney. Rather, Plaintiff only pleaded that Baker and Campbell were only employees and/or agents of T.J. Realty/Hi-Tech. Further, as specified in the Patrol Service Agreement between Evergreen and Hi-Tech that was in force at the time of the shooting, the personnel assigned by Hi-Tech to patrol the property "shall be employees of [Hi-Tech]," which was "responsible for hiring, uniforming, training and supervision of all security personnel provided hereunder." (47a, ¶ 2).

So while it may be assumed for the purposes of argument that Baker and Campbell, employees and/or agents of Hi-Tech, were acting within the scope of their employment with Hi-Tech when they allegedly breached their duty to call the police and that Hi-Tech might have been vicariously liable to Plaintiff for Campbell and Baker's alleged breach of duty, the same is not, and cannot, be true of Evergreen or Radney because Baker and Campbell were not their agents and/or employees. Thus Evergreen and Radney cannot, as a matter of law, be liable for the security guards' alleged breach of duty in failing to call the police.

(2) <u>As an Independent Contractor, Hi-Tech Was Not an Agent of Evergreen or Radney</u>

Although independent contractors may, under some circumstances, be deemed agents, there is nothing to show that Hi-Tech was an agent of Evergreen or Radney so as to impose vicarious liability upon them for the failure of Hi-Tech's security guards to call the police. As set forth in *Restatement of Agency*, 2d, § 2(3):

> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may be an agent.

Comment b further elaborates:

> Although an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another and who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent, since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.

Similarly, *Restatement of Agency*, 3d, § 1.01, comment c provides:

> Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties – the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 27 (2d ed. 1914). It is important to define the concept of "dealing" broadly rather than narrowly . . . In contrast, the common term "independent contractor" is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers. The antonym of "independent contractor" is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider. The Restatement does not use the term "independent contractor," except in discussing other material that uses the term. Section 7.07(3) states the criteria that classify a person as an employee, as opposed to a nonagent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment.

Moreover, as explained in the Reporter's Notes to comment c:

> The term "independent contractor" is defined in Restatement Second Agency § 2(3) as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." See also *Wiggs v. City of Phoenix*, 10 P3d 625, 628 (Ariz 2000) ("While it is always the case that an independent contractor is not a servant, it is not always the case that an independent contractor is not an agent"). In contrast, the preceding standard text defined an independent contractor as a person who was not an agent under the common-law definition. See 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 40 (2d ed. 1914)(defining "independent contractor" as one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means he accomplishes it."). . .

Under the agreement, Hi-Tech was considered to be "an independent contractor," which was "responsible for, but not limited to, all employee benefits of it officers." (47a, ¶ 3). Accordingly, Hi-Tech functioned as a "nonagent service provider" under contract with Evergreen and Radney to provide security services at

the apartment complex. Thus, any presumed breach of duty attributed to Hi-Tech as a non-agent independent contractor cannot be imputed to Evergreen and Radney. See *Riddle v McLouth Steel Products*, 440 Mich 85, 103 (1992) (holding that a property owner is generally not liable for the negligence of an independent contractor).

III. EVEN ASSUMING *ARGUENDO* THAT THAT HI-TECH'S SECURITY GUARDS BAKER AND CAMPBELL WERE AGENTS OF EVERGREEN OR RADNEY FOR THE PURPOSE OF IMPOSING VICARIOUS LIABILITY, THE COURT OF APPEALS ERRED BECAUSE PLAINTIFF CANNOT SHOW THAT BAKER AND CAMPBELL BREACHED A DUTY TO CALL THE POLICE OR THAT THEIR ALLEGED BREACH OF DUTY CAUSED HIS INJURIES.

But even if Hi-Tech's security guards Baker and Campbell were considered to be agents of Evergreen and Radney, Plaintiff cannot show that Baker and Campbell breached their duty under *MacDonald* by failing to "expedit[e] the involvement of the police." Accordingly, the Court of Appeals erred by not affirming the dismissal of the vicarious liability claim against Evergreen and Radney because Plaintiff's claim was unenforceable as a matter of law under MCR 2.116(C)(8).

(1) There Were No Facts Showing That Hi-Tech Security Guards Baker and Campbell Breached Their Duty of "Reasonably Expediting the Involvement of the Police" Under *MacDonald*

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 (2000). In his Second Amended Complaint, Plaintiff alleges in pertinent part:

15. On [or about August 4, 2006], resident/tenant Laura Green informed Baker and Campbell, who were approximately 30 feet away from Schaaf on a "golf cart" on patrol, that Schaaf was a non-resident on the premises, wielding a gun, making threats to shoot people, and pointed at Schaaf, identifying him to Baker and Campbell.

16. After Laura Green pointed out Schaaf as the person with a gun, threatening to shoot people, Baker and Campbell failed to take any action.

* * *

19. *Notably, although many residents notified the local police authorities of Schaaf's dangerous presence, neither Baker nor Campbell notified any police authorities of Schaaf's dangerous presence, despite an ability and a duty to do so.*

20. *Within moments of when Baker and Campbell were notified by Laura, Schaaf began to fire the weapon*, with the intention of shooting someone.

21. The bullets from Schaaf's weapon struck and injured the Plaintiff, DeVon Bailey.

* * *

27. Schaaf was later arrested . . .

(4a-5a) (Emphasis added.)

Here, Plaintiff's vicarious liability claim against Evergreen and Radney must fail as a matter of law because no factual development could possibly show that Baker and Campbell breached their duty of "reasonably expediting the involvement of the police" under *MacDonald*. For even if Baker and Campbell had called the police immediately upon being notified by Green that Schaaf had a gun and was threatening to shoot people, it would not have made the slightest bit of difference to the outcome since "*many* residents" had *already* notified the police of Schaaf"s dangerous presence. (Emphasis added.) Thus, by the time that Baker and

Campbell were notified of the possible presence of Schaaf, they could not have done anything to have "reasonably expedit[ed] the involvement of the police" for the simple fact that the police had already been called. Consequently, under the circumstances of this case, it cannot be said that Baker and Campbell breached their duty under *MacDonald* "to respond[] reasonably to situations occurring on the premises" because no breach could have occurred since the police have already been called and notified about criminal acts in progress.

(2) Plaintiff Cannot Show That the Presumed Breach of Duty by Hi-Tech Security Guards Baker and Campbell Caused His Injuries

But, even if Hi-Tech's security guards Campbell and Baker breached their duty under *MacDonald*, Plaintiff cannot show that their presumed breach caused his injuries. Causation requires both cause in fact and proximate cause. *Id*. at n 6; Cause in fact requires that the harmful result would not have come about but for the negligent conduct. *Haliw v Sterling Hts*, 464 Mich 297, 310 (2001). Proximate cause requires a natural and continuous sequence, unbroken by new and independent causes, which produces the injury. *McMillan v Vliet*, 422 Mich 570, 576 (1985). While proximate is usually a question of fact for the trier of fact, it is a question of law for the court if the facts bearing on proximate cause are undisputed and if reasonable minds could not differ. *Nichols v Dobler*, 253 Mich App 530, 532 (2002).

As already indicated, Plaintiff alleges that Schaaf started shooting just moments after Green notified Baker and Campbell that Schaaf had a gun and was

threatening to shoot people. Since many residents had already called the police and the police had not yet arrived at the scene, it would not have made a whit of difference if Baker and Campbell had also called the police. In short, no factual development could possibly justify recovery based upon Baker and Campbell's alleged breach of duty in failing to call the police because there was no possible way the police could have arrived in time to have prevented Schaaf from shooting Plaintiff in the back. In any case, proximate cause is lacking because of Schaaf's independent superseding criminal act. See *Johnston v Harris*, 30 Mich App 627 (1971), rev'd 387 Mich 569 (1972) (holding that the breach of duty owed by the landlord to the tenant could not have been the proximate cause of the tenant's injuries because the assault and battery by the assailant was a superseding cause).

Thus, even if Hi-Tech's security guards Baker and Campbell were agents of Evergreen and Radney for purposes of imposing vicarious liability upon the latter, Plaintiff's pleadings cannot show that Baker and Campbell breached any duty to him or that their presumed breach of duty caused his injuries.

IV. EVEN ASSUMING *ARGUENDO* THAT PLAINTIFF'S INJURIES WERE CAUSED BY HI-TECH'S SECURITY GUARDS BAKER AND CAMPBELL'S ALLEGED BREACH OF DUTY TO CALL THE POLICE, THE COURT OF APPEALS ERRED BECAUSE EVERGREEN AND RADNEY CANNOT BE VICARIOUSLY LIABLE FOR THE IMPUTED NEGLIGENCE OF BAKER AND CAMPBELL SINCE PLAINTIFF VOLUNTARILY DISMISSED THE INDIVIDUAL NEGLIGENCE CLAIMS AGAINST THEM.

To show that Evergreen and Radney are vicariously liable, Plaintiff also has to demonstrate that Baker and Campbell were negligent in order to impute the security guards' negligence to Evergreen and Radney. See *Al-Shimmari v Detroit*

Medical Ctr, 477 Mich 280, 295-96 (2007) (finding that the remaining defendants could not be vicariously liable because the dismissal of the claims was an adjudication on the merits). Here, the negligence claims against Hi-Tech's security guards Baker and Campbell were dismissed in the trial court, and Plaintiff expressly declined to appeal the dismissal order in the Court of Appeals. Therefore, Evergreen and Radney *cannot* be vicariously liable based upon the imputed negligence of any of their alleged agents (Baker, Campbell or Hi-Tech) because the dismissal of the claims was an adjudication on the merits. *Id*.

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.

Respectfully Submitted,

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Dated: August 1, 2012