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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

SHANDALYN SANDERS, as Personal Representative of the Estates of CIARA SANDERS, deceased, and CHAUNCEY SANDERS, deceased,

Petitioner,

-vs- CASE NO. SC12-2416

ERP OPERATING LIMITED PARTNERSHIP, a foreign limited partnership, d/b/a GATEHOUSE ON THE GREEN APARTMENTS,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON MERITS

On appeal from the Fourth District Court of Appeal of the State of Florida

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PREFACE

This is Petitioner's request for discretionary review of a decision of the Fourth District Court of Appeal dated July 18, 2012.

Petitioner, SHANDALYN SANDERS, will be referred to as "Petitioner" or "Sanders." Respondent, ERP OPERATING LIMITED PARTNERSHIP, a foreign limited partnership, d/b/a GATEHOUSE ON THE GREEN APARTMENTS, will be referred to as "Respondent" or "Gatehouse" respectively.

The following designations will be used:

(R) - Record-on-Appeal

(T) - Trial Transcript

(A) - Appendix to Jurisdictional Brief

(AA) – Appendix to Answer Brief

STATEMENT OF THE FACTS

Defendant, ERP Operating Limited Partnership (hereafter "ERP"), a foreign limited partnership, d/b/a Gatehouse on the Green, marketed Gatehouse on the Green as "resort living at its very best" and as a "gated community" (Pl's Ex. 2, AA11). That apartment complex is located in Plantation, Florida, which was unanimously described by witnesses as appearing to be a "very safe" city (T263, 977). There are 312 apartments at Gatehouse on the Green, 12 buildings and over 1,000 residents (T365). On November 29, 2004, Ciara Sanders ("Ciara"), 19 years old, filled out an application for rental of a two bedroom, two bath apartment (Def. Ex.6, AA107-09). She provided information as to her prior residences, past and current employment, and her credit history (Ibid). Ciara was taking college courses in addition to working, and was studying to be an architect (T1160-61).

The third page of the application form contained a checklist to be filled out by the owner's agent, showing that, inter alia, a credit check of the applicant had been completed, the credit report was attached, and the applicant's employment and residential history had been verified (Def. Ex. 6, AA107-09). Ciara's application form showed that the checklist was filled out by Defendant's agent on November 30, 2004 (Def. Ex. 6, AA109).

On December 1, 2004, Ciara signed a lease for a two bedroom, two bath apartment, and in addition to the monthly rent, she paid additional charges

including a $20 gate card fee and a $10 gate card deposit (Def. Ex. 8, AA111). Those fees were charged to provide the gate card for limited access through the entrance gate (T317). Ciara and her brother Chauncey moved into the apartment and Ciara's boyfriend Evan Mesadieu lived there as well (T820).

Defendant apparently did not believe it owed any duty to tenants to exercise any degree of care regarding security, as it so stated in the lease, which also required tenants to exonerate the lessor for any failure to provide such security (Def. Ex. 8, AA115):

> 19. Security: Resident acknowledges and agrees that protection against criminal action is not within Lessor's power, that Lessor does not provide (and does not have a duty to provide) any security protection services, security lighting or any other security measures at the Community, that Lessor has no obligation to conduct criminal background checks on actual or potential residents or occupants, that Resident shall look solely to the public police for security protection and Resident and Occupant are responsible for their personal security. Lessor shall not be liable for failure to provide such security measures, for failure to conduct such criminal background checks or for criminal or wrongful actions by others against Resident, Occupant, Guests or others, including actions by others which cause damage to the property of Resident, Occupant or Guests.

That provision violated §83.47(1)(b), Fla. Stat., and was therefore void and unenforceable; and the jury was so instructed (T1431).

Courtesy Officer

The operating guidelines for Gatehouse on the Green provided for a courtesy officer to live on the premises and, at the time of the incident, a Plantation police

officer received reduced rent in return for agreeing to perform that function (T398). Defendant marketed the property as having a courtesy officer, and while the operating guidelines required that the security officer patrol the premises twice a day, it was undisputed that he was not there on the night of the decedents' deaths (T319, 362-63). Additionally, the courtesy officer was required to fill out daily incident reports; however, no such reports were ever produced in this case, and Defendant's representatives admitted there were no such written reports (T399, 411-12, 752). Defendant's representative admitted that part of the courtesy officer's duties was to maintain a presence on the property (T725). However, Michael Rathburn ("Rathburn"), who resided at Gatehouse on the Green from 2004 through 2006, testified that he never saw the courtesy officer the entire time he lived there (T512-13).

Notices of Crime

Gatehouse on the Green was owned by Defendant, ERP, a national company that owns approximately 100 properties in the eastern United States, and has a policies and procedures manual that requires, inter alia, notices to residents of criminal activities on the premises (Pl's Ex. 1, AA2-9, T565, 1110). That written policy states that a notice to residents is recommended when "a significant crime" occurs on the property, especially a violent crime or a forced entry burglary (Pl's

Ex. 1, AA2). However, the policy provided that whether a notice should be provided to residents, and the content of any such notice, "had to be discussed in advance with ERP's legal representative" (Pl's Ex. 1, AA2). While Defendant's policy was for the notices to be delivered to residents on the same day that management learned of the criminal incident, the manual also stated (in capital letters) that all such notices had to be faxed to Defendant's legal representative for review and approval before being distributed to residents (Pl's Ex. 1, AA2). It is undisputed that the "legal representative" of Defendant was a paralegal in Chicago (T313).

Despite Defendant's policies and procedure manual, Colleen Yeager ("Yeager"), the regional manager for ERP, conceded that she was not aware there was a written policy to notify tenants of crimes occurring on the property (T310). After being shown the manual, she conceded there was such a requirement (T311-12). However, despite the fact that there was documentation of twenty criminal incidents on the Gatehouse on the Green premises in the three years prior to the decedents' deaths, Yeager admitted that no notices had ever been provided to tenants regarding criminal activity on the premises during that time period (T312).

Kirin Bozan Jackson ("Jackson"), the property manager for Gatehouse on the Green, testified that she assumed tenants would inform management of any criminal activity, despite the terms of the lease which directed tenants to report

crime only to the police (T429). While she was aware that any notice of criminal activity required that she call Chicago to have Defendant's "legal representative" approve the notice, Jackson was unable to testify to a single time she had ever contacted Chicago regarding whether a notice of criminal activity should be provided to tenants (T433-45).

In addition to recommending that the residents be notified of criminal activities on the premises, the ERP policy manual also provided a specific form for notices of violent crimes, as well as disturbances such as domestic disputes, etc. (Pl's Ex. 1, AA2-9). Nonetheless, despite the fact that the twenty criminal incidents included 7 burglaries of apartments, 2 robberies, and 11 motor vehicle thefts, no notice was ever provided to any tenants (T307).

Additionally, ERP's policy manuals required incident reports to be prepared and provided to its risk management department if there was damage to ERP's property, injury to any individual, theft, damage or loss of a resident's belongings, or any criminal incident (T356). Nonetheless, despite the twenty criminal incidents identified through documentation, no such incident reports were ever prepared at Gatehouse on the Green (T300, 357-62).

Entrance Gate

Gatehouse on the Green was marketed as a "gated community."[1] The gate was a significant security precaution because the Gatehouse on the Green premises had water surrounding 70% of its perimeter, and a wall or fence on the remaining boundaries (T1000). There was documentation of at least two criminal incidents occurring in the prior three years while the gate had been broken, in which the criminals had followed tenants into the property; one case resulting in an armed robbery and the other in a burglary (T350-53).

There was extensive evidence at trial that the gate was broken and left in the open position repeatedly in the years prior to the murders of the decedents (T848, 874). Michael Rathburn, who lived at Gatehouse on the Green for two years, testified that he complained multiple times about the gate being broken (T509-10). At trial, Plaintiff demonstrated that the gate had remained broken for at least two months immediately prior to the decedents' deaths on September 7, 2005 (T457). A vendor had submitted a proposal to fix the gate on July 6, 2005, but a contract to do the work was not entered into until August 5, 2005, (T459-60). That contract provided for a starting date of August 15, 2005 and a finishing date of October 15, 2005 (T459-60), but nothing had been done prior to the decedents' deaths.

[1] The lease provided that the automated entrance gate could be removed at any time and that it was only for "lessor's own purposes," whatever that means (Pl's Ex. 2, AA11; Def's Ex. 8, AA115).

It was undisputed that on the night of the incident the gate was broken and left in the open position (T316, 454). Jackson acknowledged that it had been broken for a while and claimed that the vendor which contracted to replace it stated that it was so old that replacement parts were no longer available (T459-60). Defendant's contention that it had acted reasonably and expeditiously to get the gate fixed prior to the murders was belied by the fact that the day after the incident the gate was fixed (T480).

The Incident

On the evening of September 7, 2005, Ciara and Chauncey were murdered at Gatehouse on the Green (T1117). Both were shot in their apartment, with Ciara being shot six times, including in her lower extremities, hand, neck and head (Ibid). Chauncey was shot execution style in the back of the head (T909). Despite being shot six times, Ciara did not die in the apartment, but died later at the hospital (T1142). Ciara was found alive at the apartment with her three month old baby next to her unharmed (T1140).

Based on shell casings found on the floor at the scene, it was clear that at least one semi-automatic pistol was used by the perpetrators (T889). There was no indication of forced entry; however, an engagement ring valued at $1,000, over $1,140 in cash, some credit cards, and a computer modem were stolen from the

apartment (T928-1121). The police were at the scene the evening of the crime and, although they commenced an investigation, no perpetrators have been apprehended (T612, 825).

While Gatehouse on the Green had never previously provided notices of prior criminal activity, it did circulate a notice regarding this crime the day after it occurred (Def's Ex. 7, AA110, T673). That notice informed tenants that Ciara and Chauncey knew their attackers, a fact that has never been established; and it was admitted into evidence over Plaintiff's objection at trial (T673), and is the subject of Plaintiff's cross-appeal.

STATEMENT OF THE CASE

Shandalyn Sanders, as Personal Representative of the Estates of Ciara Sanders and Chauncey Sanders, filed a Complaint alleging negligence claims against Defendant, ERP Operating Limited Partnership, d/b/a Gatehouse on the Green Apartments (R-1-1-8). Defendant filed an Answer denying virtually every allegation of the Complaint (R-1-9-10).

Expert Testimony

At trial, Plaintiff presented the testimony of Dr. George Kirkham, who has a Ph.D. in criminology from the University of California at Berkeley (T521). He testified that most of the crimes at Gatehouse on the Green in the three years prior to the murders were opportunistic crimes (T540-49, 585). Those are crimes committed by perpetrators who look for easy or "soft" targets, and cruise an area not sure if they are going to break into a car, steal a purse, etc. (T540-44, 585). Dr. Kirkham testified that such precursor crimes need to be monitored and publicized by the landowner, because the residents' awareness is the "cornerstone of crime prevention" (T541-42). In fact, he noted that Defendant's training video informed its personnel that they needed to minimize such problems "through awareness" (T563). He testified that Defendant did not act reasonably or consistent with its

own training video, because it was not even aware of the crimes occurring on their property, nor informing residents of them (T565).

Dr. Kirkham testified that opportunistic criminals need to be precluded from easy access to the premises, such as by a gated community, which Defendant's apartment complex was supposed to be (T544). He noted Defendant's training video stated that it was of "utmost importance" that mechanical failures such as the entry gate be repaired as soon as reasonably possible (T572). However, the evidence demonstrated that the gate was inoperable for four months during the year of these murders (T573).

Dr. Kirkham also testified that to deter opportunistic crimes, the residents need to be aware of criminal incidents and suspicious activity (T555-56). By being made aware of that information which relates to their personal safety and the protection of their property, residents can protect themselves by increasing their vigilance (T555-57).

Dr. Kirkham testified that ERP did nothing to learn of criminal activity on its premises, even though the local Police Department would provide that information for free (T558). ERP did not follow the reasonable steps in its own policy manual regarding notifying residents of criminal activity (T564-66).

Dr. Kirkham reviewed the reports of the twenty criminal incidents reported at Gatehouse on the Green in the preceding three years, and noted that they were

opportunistic crimes that were "highly deterrable through conventional target hardening measures" (T585). Those measures included limiting access by having an operable traffic gate and increasing residents' awareness and vigilance (T585-86).

Dr. Kirkham was also asked how he would classify the murders of the decedents. He testified that based on the evidence it appeared that it was an opportunistic crime that escalated, and that it was not a targeted hit, as Defendant's expert opined (T592-94). The Defendant's expert opined that the murders were planned by an "assassin" and that there was nothing the Defendant could have done to prevent them (T1030). Dr. Kirkham noted that a targeted hit would be done professionally with a minimum of risks, and these murders were sloppy and recklessly committed (T592). He testified that Ciara's apartment was a bad location for a "hit" since it was at the very back of the Gatehouse on the Green property which had 300 units, which meant there was no easy exit (T592). There were multiple gunshots with many shell casings left at the scene (T593). Dr. Kirkham testified that the number of bullets used to kill Ciara was indicative of panic and overkill, not the conduct of a planned and targeted hit (T595). He also noted that cash, a credit card, jewelry and a computer were removed from the apartment, and that a professional killer would not waste time rummaging around looking for such items after a targeted hit (T595). Based on this evidence, Dr.

Kirkham testified that it appeared the killing occurred in the course of another felony, such as a home invasion and, thus, was an opportunistic crime (T594).

Without objection, Dr. Kirkham testified to issues of causation. He testified that this incident was foreseeable in light of the prior criminal history on the premises, and that Defendant's omissions contributed to the likelihood of such a crime, including permitting the gate to be broken for long periods of time, and not informing residents of the extent of known criminal conduct on the premises (T605). Dr. Kirkham testified that the criminal incidents such as those which caused the decedents' deaths are "highly deterrable through conventional target hardening measures" (T585).

Defendant's security expert was William Booth, who did not have a degree in criminology (T1025). He had previously filed an affidavit in the case in which he opined that Ciara had been murdered by a "professional assassin" (R-15-2407; T1060). While his affidavit stated that nothing was missing from the apartment after the murders, in his deposition he testified that he believed that certain items had been stolen (T1138). Booth acknowledged that Ciara had been shot six times, including in the lower extremities, neck and head; and he stated it was "difficult to envision" that they were defensive wounds, and suggested that the number of shots might indicate that the killer was "sending a message" (T1142).

Defendant relied on Booth's testimony to argue to the jury that the decedents knew their attacker(s) and alternatively that the decedents were comparatively negligent for opening the apartment door to the "assassin" (T1020, 1041).

Verdict and Judgment

The jury returned a verdict finding that Defendant and each of the decedents had been negligent and apportioning fault 40% to Defendant and 60% to the decedents on each claim (R-21-3573-77). The jury awarded total damages (before the comparative negligence reduction) of $3.75 million to the three survivors of Ciara Sanders' estate and $750,000 to the two survivors of Chauncey Sanders' estate (R-21-3573-77). After denying Defendant's post-trial motions, the Court entered Judgment consistent with the jury verdict (R-22-3775-79).

Defendant appealed the Judgments to the Fourth District Court of Appeal, which issued an Opinion reversing and remanding the case for entry of judgment in favor of the Defendant. While the Fourth District recognized that there was evidence sufficient to support a finding that Defendant had breached its duty to provide adequate security, the Court ruled that Plaintiff could not establish that the breach was the proximate cause of the murders because there was no evidence of forced entry into their apartment. The Fourth District's Opinion contains an inaccuracy when it states that: "Of the twenty crimes which occurred in the

premises in the three years leading up to the murders, none were violent crimes nor predicted homicide." In fact, there were three incidents involving violence or the threat of violence. On January 27, 2003, there was a burglary of an apartment in which the victim was confronted, grabbed by her hair and dragged into her apartment and slapped (T931-32). On March 8, 2004, there was a robbery of a pizza delivery person in which three males confronted him, pushed him to the ground and stole his merchandise and cash (T991-92). On August 28, 2004, there was an armed robbery in which the perpetrator followed the victim into the complex (apparently through the broken gate) and after she parked came up behind her with a gun and told her to give him everything she had or he would kill her (T935-36). Thus, three of the incidents involved either violence or threat of violence (with a firearm).

Plaintiff filed a Motion for Rehearing which was denied and, thereafter, she sought review in this Court. This Court provisionally accepted jurisdiction and directed the parties to file briefs on the merits.

SUMMARY OF ARGUMENT

The Fourth District erred in ruling that the Plaintiff failed, as a matter of law, to present evidence sufficient to create a factual issue regarding causation in this negligent security case. This Court has repeatedly held that the question of proximate cause is classically a jury issue, which can only be determined as a matter of law if the evidence is unequivocal and leads to only one reasonable conclusion. Here, as the Fourth District acknowledged, the Plaintiff presented sufficient evidence that the Defendant landlord had breached its duty to provide reasonable security measures for the residents of Gatehouse on the Green. The Fourth District seized on one fact, that there was no evidence of forcible entry, to justify a conclusion that as a matter of law, the Defendant's negligence could not have been causally related to the decedents' deaths. However, common sense and the testimony of Plaintiff's expert, compel the conclusion that the Defendant's failure to maintain the security gate and ensure that the courtesy officer performed his function could reasonably be found to be causally related to the crimes that lead to the decedent's deaths. Additionally, it is undisputed that despite having twenty reported criminal acts on the premises in the prior three years, the Defendant violated its own policies by failing to provide any notice to the residents of that danger. As Plaintiff's expert testified, awareness of the criminal activity on the premises was necessary to properly inform the residents and enable them to

exercise vigilance on their own behalf to deter such misconduct. With this factual predicate, the issue of proximate cause was clearly a question of fact which did not lead to only one reasonable conclusion, and, therefore, it should have been a question of fact for the jury, as the trial court ruled. For these reasons, this Court should quash the decision of the Fourth District and remand the case for entry of judgment in accordance with the jury verdict.

ARGUMENT

THE FOURTH DISTRICT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE PLAINTIFF COULD NOT PROVE PROXIMATE CAUSE, AND THAT AS A RESULT, THE DEFENDANT WAS ENTITLED TO A DIRECTED VERDICT ON LIABILITY.

The Fourth District reversed the trial court's denial of Defendant's Motion for Directed Verdict on the issue of causation and remanded the case to the trial court for entry of judgment in favor of the Defendant. The Fourth District held that since there was no evidence of forcible entry into the decedents' apartment, the Plaintiff was unable, as a matter of law, to prove that the Defendant's negligence was a proximate cause of the decedents' deaths. That ruling is contrary to decisions of this Court and other district courts regarding the application of the directed verdict standard to causation issues. It is also inconsistent with the principle that in negligence cases proximate cause is ordinarily a question of fact to

be determined by the jury based on all the facts and circumstances. In McCain v. Fla. Power Corp., 593 So.2d 500, 504 (Fla. 1992), this Court has stated:

> The judge is free to take this matter [causation] from the fact-finder only where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference.

Here, the evidence does not unequivocally support a finding that Defendant's negligence had no causal connection to the decedents' deaths and, therefore, the Fourth District erred in ruling that a directed verdict should have been granted.

In this case, the Fourth District specifically acknowledged that Plaintiff presented sufficient evidence to prove that Defendant had breached its duty to provide adequate security to residents of Gatehouse on the Green. Nonetheless, it determined that a directed verdict was justified solely because there was no evidence of forcible entry into the decedents' apartment. However, as discussed in more detail below, that fact alone does not logically compel the conclusion that Defendant's negligence had no causal connection to the decedents' deaths.

Recently, in Cox v. St. Joseph's Hospital, 71 So.3d 795, 801 (Fla. 2011), this Court reversed a district court for holding that a directed verdict should have been granted on causation in a negligence case, stating:

> As our review of the case law illuminates, while a directed verdict is appropriate in cases where the plaintiff has failed to provide evidence that the negligent act more likely than not caused the injury, it is not appropriate in cases where there is conflicting evidence as to the causation or the likelihood of causation. If the plaintiff has presented

> evidence that could support a finding that the defendant more likely than not caused the injury, a directed verdict is improper.

Additionally, district courts in Florida have repeatedly held that directed verdict motions should be treated with special caution in negligence cases because the evidence supporting the elements of such claims are frequently subject to more than one interpretation. See Etheredge v. Walt Disney World Co., 999 So.2d 669, 671 (Fla. 5th DCA 2009); Nunez v. Lee County, 777 So.2d 1016 (Fla. 2d DCA 2000); Regency Lake Apartments Associates Limited v. French, 590 So.2d 970, 972 (Fla. 1st DCA 1991).

Moreover, this Court has long held that the question of whether a defendant's negligence was a proximate cause of plaintiff's injuries is generally one for the jury, Helman v. Seaport Coastline Railroad Co., 349 So.2d 1187, 1189 (Fla. 1977); Dep't of Transportation v. Anglin, 502 So.2d 896, 899 (Fla. 1987). The district courts are clearly in accord, e.g., Pamperin v. Interlake Cos., Inc., 634 So.2d 1137, 1139 (Fla. 1st DCA 1994) ("The circumstances under which a court may resolve the question of proximate cause as a matter law are extremely limited."); Lindsey v. Bell South Telecommunications, Inc., 943 So.2d 963, 966 (Fla. 4th DCA 2006) (same); Olson v. Crowell Plumbing & Heating Co., Inc., 48 So.3d 139, 143 (Fla. 5th DCA 2010) (same); Sawyer v. Allied International Holdings, Inc., 707 So.2d 761, 763 (Fla. 2d DCA 1998) ("proximate cause

questions generally must be resolved by the trier of fact based on all the facts and circumstances presented").

Of course, there can be more than one cause of a plaintiff's injuries or death, see, Stahl v. Metropolitan Dade County, 438 So.2d 14, 18-22 (Fla. 3d DCA 1983); see also, Fla. St. Jury Instr. 401.12. All that is necessary for a plaintiff to overcome a motion for directed verdict is to present evidence that the defendant's conduct was more likely than not a proximate cause of the plaintiff's injury or death, Cox v. St. Joseph's Hospital, supra 71 So.3d at 801. This means that plaintiff only has to present evidence that the defendant's negligence "directly and in natural and continuous sequence produces or contributes substantially to producing" the decedent's deaths. Fla. St. Jury Instr. 401.12. The Plaintiff satisfied that burden here by proving the frequency of reported crimes on the premises, the Defendant's failure to convey that information to residents, the Defendant's failure to fix the security gate, and the Defendant's failure to have a functioning "courtesy officer" on the premises. Plaintiff's expert testified to how those acts of negligence increased the likelihood of crime on the premises, and put the residents at risk because they were not fully aware of the danger.

In Holley v. Mt. Zion Terrace Apartments, Inc., 382 So.2d 98 (Fla. 3d DCA 1980), the court reversed a summary judgment entered in favor of the landlord in a negligent security action in which a tenant was raped in murdered in her apartment.

The court rejected the defendant's contention that its alleged negligence could not be causally related to the death because the action occurred within the tenant's apartment, stating (382 So.2d at 101):

> Moreover, contrary to its contention, Mt. Zion's potential liability is not foreclosed by the fact that the assault and murder did not take place in a common area it had the duty to maintain, but rather inside Ms. Bryant's apartment. The basis of the plaintiff's case is the almost undisputed fact that the intruder could have entered the apartment only through the common walkway adjacent to the decedent's window. Since this is true, it was for the jury to determine whether the defendant's alleged breach of duty as to the areas outside the apartment was a legal cause of what happened inside. Many of the cases specifically so hold.

Similarly here, the Defendant's failure to provide adequate security for the common area including the failure to fix the security gate and the failure to have a functioning "courtesy officer," could reasonably be found by a fact-finder to be causally related to the decedents' deaths. The apartment where they were killed was at the back of the complex, and so, in addition to having to be able to have access to it, the murderer (or murderers) had to be confident they could "escape" without risk; and a proper functioning security gate and courtesy officer clearly could have deterred such conduct.

In fact, in Holley, the court also rejected the argument that the plaintiff could not prove causation, stating (382 So.2d at 102):

> We find, to the contrary, that the defendant did not affirmatively show either that the murderer would not have been seen and stopped from entering the apartment if reasonable security had been present; or that

> the crime would not even have been attempted in the face of the deterrent effect of such protection.

As Plaintiff's expert testified, having a functioning security gate, the presence of a functioning "courtesy officer," and increasing the awareness of the residents to the threat of criminal conduct all could have acted to deter the kind of crime that resulted in the decedents' deaths (T587-89). Therefore, the legal principles relied on in Holley, clearly demonstrate that the trial court here properly denied the Defendant's motion for directed verdict on the causation issue.[2]

Subsequent to the Fourth District's opinion in this case, a federal judge was faced with a similar issue, and properly relied on Holley, supra. In North v. Mayo Group Development, L.L.C., 2013 WL 2319430 (M.D. Fla. 2013), the plaintiff sued the landlord for negligent security and obtained a favorable verdict, albeit reduced significantly for comparative negligence. The defendant filed a post-trial Motion for Judgment as a Matter of Law, relying primarily on the Fourth District's opinion in the case sub judice. The district judge denied that motion, stating:

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[2] In footnote 2 of its opinion, the Fourth District rejected Plaintiff's reliance on Holley, on the grounds that it was factually distinguishable since there was more violent crime at that apartment complex and the intruder entered the apartment through a second story window. Respectfully, those are not valid distinctions for purposes of the legal analysis of Holley, which is basically that if the criminal had to cross the common area in order to reach the apartment where the crime occurred, and there was evidence of the failure of the Defendant landlord to act reasonably in a manner that could deter criminal conduct, there is a jury issue as to causation.

> This case is different from Sanders. The facts regarding how the intruders gained entrance onto the Defendants' unsecured premises are known. Plaintiffs' evidence showed that there was a reduction in security measures on the premises prior to shooting. There was a history of criminal violence at the apartment complex. On the day of the event, no security staff was on duty and the security gates were broken. There was evidence to suggest that had a reasonable security been present, the assailants might have been deterred. See Holley v. Mt. Zion Terrace Apartments, Inc., 382 So.2d 98, 102 (Fla. 3d DCA 1980) (denying summary judgment, but noting that causation could have been established had the defendant shown that "the crime would not even have been attempted in the face of the deterrent effect of such protection."). Accordingly, Defendants failed to show that the lace of security measures had no effect on the outcome of the incident.

That same rationale compels rejection of the Fourth District's conclusion here, since Plaintiff presented essentially the same evidence of negligence and causation that the court relied upon in North to deny the Defendant's Motion for Judgment as a Matter of Law.

The Fourth District did acknowledge that there were twenty criminal incidents on the premises in the three years prior to these murders, and that despite its internal policies the Defendant did not provide any notice to any of the residents of any of those criminal incidents. However, contrary to the Fourth District's opinion, at least three of those incidents involved violence or threats of violence, as detailed supra p.5. Clearly, the failure to notify residents of a dangerous condition on the premises can, in itself, be a proximate cause of injuries or deaths under these circumstances.

More specifically, a jury could reasonably conclude that a resident's decision whether to open their apartment door to someone without engaging in significant scrutiny is influenced by whether they are aware that they live in a dangerous area and whether they believe there are adequate security measures in place.

Here, it is undisputed that the Defendant did not inform the residents of any of the twenty crimes which occurred on the premises in the preceding three years. As a result, the decedents may have believed they lived in a safe area (which Plantation was perceived as being) (T263, 977) and, as a result, were not diligent in determining who was at their door before they opened it (as the jury may have found). However, those circumstances do not justify a conclusion that, as a matter of law, the Defendant's negligence was not a proximate cause of the decedents' deaths.

For example, in Green Companies v. Divincenzo, 432 So.2d 86 (Fla. 3d DCA 1983), the owner of an office building had reduced the security measures despite the fact that the likelihood of harm to the tenants had not diminished. The plaintiff was working in his office and left it unattended, with the door unlocked, while he went across the hall to the bathroom. Upon returning to his office, he was attacked and suffered significant injuries. The jury returned a verdict finding that the owner was 75% responsible for plaintiff's injuries, and that the plaintiff had

contributed 25% to those injuries by his comparative negligence. The owner of the building appealed, and the Third District upheld the decision, noting that plaintiff had proved a prima facie case, and that his conduct in leaving his office unlocked and unattended was properly considered by the jury as an issue of comparative negligence. Similarly here, assuming arguendo that the decedents opened the door to the people who murdered them, that does not bar recovery, as a matter of law, but only creates an issue of comparative negligence.

In fact in Jenness v. Sheraton Cadillac Properties, Inc., 211 N.W. 2d 106 (Mich. App. 1973), the court held that the customer of a hotel was not barred as a matter of law from suing the hotel for negligent security, even though he had invited the assailant into his hotel suite. The court noted that while his actions were "not prudent," (211 N.W. 2d at 108), they did not amount to negligence or contributory negligence as a matter of law that would bar the action; it was simply a factual issue for the jury to determine.

Additionally, in Burkhart v. Ward, 861 P.2d 317 (Okla. App. 1991), a tenant left his apartment and went into the hallway after hearing loud banging on the door of an adjacent apartment. Unfortunately, he was quickly smashed in the head with a club, suffering significant injuries. He sued the landlord, and the trial court granted summary judgment finding no duty, and the appellate court reversed noting, inter alia, that (861 P.2d at 319):

> Because of the heightened security measures and the enclosed nature of the building, residents may have felt reasonably secure in opening their doors to the common hallways, whether to investigate disturbances or simply to leave their apartments.

The Oklahoma appellate court determined that there was a duty owed by the landlord to the plaintiff, and that the issues of whether that duty was breached and was a proximate cause of the plaintiff's injuries were "factual issues which should be weighed by a jury." Id.

Similarly here, there is no justification for the Fourth District's determination that the lack of any evidence of forcible entry barred the Plaintiff's action, as a matter of law, based on causation principles. Ciara and her brother lived in a "gated community" in a bucolic suburban neighborhood, with a resident police officer, and the perception of security. While a jury could, and did, find that they had been comparatively negligent, that is no reason to exonerate the Defendant from its negligence in failing to maintain existing security measures and properly informing tenants of danger, all of which contributed to the Plaintiffs' deaths.

The failure to maintain the front gate and permitting it to be broken for a significant period prior to the murders was a circumstance from which the jury could reasonably find that the Defendant's conduct was a proximate cause of decedents' death. As Plaintiff's expert testified, most of the twenty precursor crimes were opportunistic in nature, and the fact that personal property and cash

was stolen from the decedents' apartment created a reasonable inference that their murders resulted from an opportunistic crime. Testimony was presented that such opportunistic crimes can be minimized through awareness and preventive measures, such as security gates, especially where, as here, there was no other means of access to the property.

In fact, the absence of evidence of forcible entry does not necessarily mean that either of the decedents opened the door voluntarily to the attackers who subsequently murdered them. Another reasonable scenario was that one of the decedents had been accosted in the parking lot or on their way to the apartment by the assailants and forced to open the door to the apartment. In fact, one of the precursor crimes involved precisely that scenario, albeit it only resulted in a burglary of the apartment, not a murder (T931-32). While it would seem from the jury's assessment of 60% of fault to the decedents that they did not conclude that was the factual scenario here, the point is that the evidence does not compel the conclusion that the decedents knew their attackers or even voluntarily opened the door to permit them access to their apartment. Since the evidence did not lead to only one reasonable inference, the causation issue could not be determined as a matter of law in this case, McCain, supra.

The Fourth District concluded that it was bound by its prior decision in Brown v. Motel 6 Operating, L.P., 989 So.2d 658 (Fla. 4th DCA 2008), but that

case involved clearly distinguishable facts (even assuming arguendo, Brown was properly decided).[3] In Brown, a customer was murdered in a motel room and there was no evidence of forcible entry. However, the motel had a security guard present on the night of the incident, there were also surveillance cameras on the premises, and there were significantly fewer prior criminal acts on the premises than in the case sub judice (five reported in the prior two years). Additionally, there was no evidence in Brown of any property crime associated with the decedent's death. Brown did not involve the failure to maintain existing, and promised, security measures such as security gate or "courtesy" officer, and did not involve a complete failure to inform the residents of significant criminal activity on the premises.

Thus, neither Brown, nor general negligence principles justify the conclusion that the lack of forcible entry here should compel a directed verdict on causation. The Massachusetts Supreme Court applied the appropriate analysis in Fund v. Hotel Lenox of Boston, Inc., 635 N.E.2d 1189 (Mass. 1994). In that case, the plaintiff's decedent was murdered in a hotel room, but there were no signs of

[3] It should be noted that the plaintiff in Brown sought discretionary review of the Fourth District's decision in this Court (ironically, represented by Defendant's appellate counsel in the case sub judice), and this Court denied that petition for review, Brown v. Motel 6 Operating, L.P., Ltd., 1 So.3d 171 (Fla. 2009) (Table). However, the plaintiff in that case claimed decisional conflict with a completely different set of cases than are argued herein, relying solely on cases addressing the foreseeability of criminal acts.

forcible entry. Nonetheless, the Massachusetts Supreme Court ruled that fact did not preclude plaintiff from prevailing on the issue of causation because the circumstances indicated that the likelihood the assailant was a hotel guest or the decedent's visitor was "not great." The Court reasoned as follows:

> The absence of reasonably adequate means of detecting intruders and the hotel's failure to control and monitor intruders' means of access to and egress from the hotel indicate that the risk of harm from an intruder was enhanced by the hotel's negligent omissions. That risk was sufficiently great that the less plausible possibility, that the assailant was a guest or some other person authorized to be in the hotel, should not bar the plaintiff from submitting his case to a trier of fact.

That analysis, which was based on the same common law tort principles which should have been applied here, demonstrates the error in the Fourth District's reasoning.

In summary, the opinion of the Fourth District conflicts with decisions of this Court and other district courts of appeal regarding the application of the directed verdict standard on causation in negligence cases. The Fourth District determined the causation issue, as a matter of law, based on one factual aspect of the case, i.e., the lack of forcible entry into the decedents' apartment. However, that fact in itself cannot exonerate the Defendant from the consequences of its negligence, which substantially contributed to the likelihood of the crimes which resulted in the decedent's deaths. The failure to maintain reasonable security measures, especially in the face of significant prior criminal activity on the

premises; and the failure to provide notice to the tenants of the dangerous condition of the premises; were breaches of duty which the jury could reasonably determine were a proximate cause of the decedents' deaths. The lack of forcible entry should not prevent the jury from reasonably concluding that the Defendant's negligent conduct, more likely than not was a proximate cause of the decedents' deaths. Therefore, this Court should quash the decision of the Fourth District and remand for an affirmance of the judgment entered by the circuit court.

CONCLUSION

For the reasons stated above, this Court should quash the decision of the Fourth District and remand for an affirmance of the judgment entered by the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to RICHARD A. SHERMAN, ESQ. (rsherman@appealsherman.com), 1777 South Andrews Ave., Ste. 302, Ft. Lauderdale, FL 33316; JOEL R. WOLPE, ESQ. (jwolpe@wlaf-law.com), 28 W. Flagler St., 11th FL, Miami, FL 33130; and MATTHEW D. LEVY, ESQ.(mattlevy@metnickandlevy.com), 15300 Jog Road, Ste. 103, Delray Beach, FL 33446, by email, on September 26, 2013.

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CERTIFICATE OF TYPE SIZE & STYLE

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