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State of Minnesota
In Court of Appeals

Rosalie White and Kenneth White, II, as Co-Trustees
for the Next of Kin of Kenneth Lee-Winans White, III,
a/k/a Monogeshig, Decedent,

Appellants,

vs.

Many Rivers West Limited Partnership
d/b/a Many Rivers Apartments, et al.,

Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE

1. Did the district court err by finding that respondents did not breach a duty to appellants, where respondents knew of the hidden and dangerous condition of the windows and appellants did not, where the respondent retained control of the windows in the apartment appellants visited, and where respondents negligently repaired the windows?

The district court held that respondents did not breach any duty properly owed appellants because they did not hide any dangerous condition from appellants, and while they maintained control over the windows and screens, this did not impose a duty to install child-proof screens, and respondents did not negligently repair the windows.

Drager ex rel. Gutzman v. Aluminum Indus. Corp., 495 N.W.2d 879 (Minn. Ct. App. 1993)

STATEMENT OF THE CASE AND FACTS

Rosalie and Kenneth White, II, appeal from the district court's grant of summary judgment in favor of respondents dismissing their complaint alleging negligence for the death of their two-year-old son. Kenneth Lee-Winans White, III ("Kenny"), was killed when he fell from a third-floor apartment window in the building owned and managed by appellants. (AA-9)

Respondents Many Rivers West Limited Partnership ("Many Rivers West LP"), Many Rivers Limited Partnership ("Many Rivers LP"), and American Indian Community Development Corporation ("AICDC") own Many Rivers Complex, which is comprised of two apartment buildings, Many Rivers East and Many Rivers West. (AA-2) Respondent Perennial Management LLC ("Perennial") is the management company that operates and manages the day-to-day operations of the Many Rivers Complex. (AA-2-3) Perennial's responsibilities include collecting rent, certifying that tenants meet income guidelines for residency, taking work orders from tenants, and completing general maintenance for the Many Rivers Complex. (AA-3) Perrennial conducts semi-annual inspections of the residential units. (*Id.*) As part of these inspections, Perrennial examines the window screens to determine if they are within the window frame, without holes, and not bent. (*Id.*) Perrennial staff also checks the windows to ensure they are in working order. (*Id.*)

In June 2006, a child was injured after falling through a window from the fourth floor of Many Rivers West Building. (AA-3) Shortly after the fall, respondents provided notices to residents informing them of the child's fall, and recommending that windows

only be opened from the top to prevent a similar fall. (AA-3-4) Both notices also stated that respondents would be working with officials on the safety of the windows. (*Id.*)

During the summer of 2006, Arlene White, Kenny's grandmother, and Dawn Steece, Kenny's aunt, lived in apartment #311 of the Many Rivers East building. (06/10/09 Dep. of Arlene White ("A. White Dep.") at 8-9; 06/10/09 Dep. of Dawn Steece ("Steece Dep.") at 4) When Arlene White moved into her apartment the screens did not stay in the windows. (A. White Dep. at 45) Arlene White stated that she only needed to touch the screens for them to fall out. (*Id.* at 48) Perennial screwed the screens into the framework of the building with longer screws. (*Id.* at 45) The screens were secure in the window until summer of 2006, when Perennial removed all of the screens. (*Id.* at 45) Arlene White informed Perennial that she was concerned the screws had been removed because the screens again popped out so easily. (*Id.* at 48) Arlene White stated that when the screens were installed with longer screws into the framework of the window, you could lean your head against the screen would remain secure. (*Id.* at 48) Arlene White believes that the mesh screen would have held Kenny in the apartment had they still been screwed into the framework with longer screw. (*Id.* at 48)

On August 7, 2006 Kenny arrived with his mother, Rosalie White, his brother, five-year-old Xavier White and his infant sister Elizabeth for a visit to his grandmother and aunt at their apartment. (A. White Dep. at 14; 06/10/09 Dep. of Rosalie White ("R. White Dep.") at 21-22) On August 8, Dawn Steece and Arlene White went to their respective jobs. (A. White Dep. at 14; Steece Dep. at 10) Dawn Steece returned home in the late afternoon. (Steece Dep. at 10-11) Kenny and Xavier were playing in a bedroom

in the apartment. (*Id.*) Dawn Steece and Rosalie White checked on the boys several times while they played in the bedroom. (R. White Dep. at 33; Steece Dep. 11, 18) The air conditioning was on and it was customary for the windows to be closed when the air was on. (R. White Dep. at 32; A. White Dep. at 16;) Rosalie had also latched and locked the window. (R. White Dep. at 33) She returned to the living room to breastfeed her infant daughter. (*Id.*) At some point between 5:30 p.m. and 6:00 p.m., Xavier came in to the living room and told his mother that something had fallen. (R. White Dep. 29:20-23) Rosalie White immediately got up to investigate. (R. White Dep. 39:18-19, Steece Dep. 20:17-20.) She entered the bedroom, saw the open window, and saw her child on the ground below. (R. White. Dep. 39:18-19.) Rosalie White called 911 and ran downstairs. (R. White Dep. 39:19-21.) Kenny was taken to Hennepin County Medical Center where he later died.

In February 2009, Rosalie and Kenneth White, II, sued respondents alleging a negligence claim against respondents. Respondents moved for summary judgment on March 23, 2010. Appellants filed its Opposition to the Motion for Summary Judgment on May 28, 2010. Respondents filed a Reply Memorandum on June 7, 2010. A hearing on the matter was held June 10, 2010.

The district court granted summary judgment in favor of respondents and dismissed the Whites' complaint with prejudice, finding that respondents did not breach any duty owed to Kenny White. (AA-7, 9, 11) This appeal follows.

ARGUMENT

THE DISTRICT COURT ERRED BY FINDING THAT LANDLORD AND PROPERTY MANAGER RESPONDENTS DID NOT BREACH A DUTY OWED TO APPELLANTS, WHERE RESPONDENTS KNEW OF THE HIDDEN AND DANGEROUS CONDITION OF THE APARTMENT'S WINDOWS AND SCREENS AND APPELLANTS DID NOT, WHERE RESPONDENTS RETAINED CONTROL OF THE APARTMENT'S WINDOWS AND SCREENS, WHERE RESPONDENTS NEGLIGENTLY REPAIRED THE PREMISES AND WHERE THERE ARE MATERIAL DISPUTED FACTS AS TO WHETHER RESPONDENTS BREACHED THE DUTY OF CARE.

Summary judgment may be granted only when, based on the pleadings, discovery, and affidavits filed with the court, no genuine issues of material fact exist and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, an appellate court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002); *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). On review, the evidence must be viewed in the light most favorable to the party against whom the district court granted summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the nonmoving party must do more than rely upon mere averments in the pleadings or unsupported allegations to show that disputed material facts exist; instead, he must come forward with specific facts to satisfy the burden of production. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A genuine issue of fact exists where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *See id.* at 69. Summary

judgment is inappropriate, therefore, "when reasonable persons might draw different conclusions from the evidence presented." *Id.*

To establish negligence, a plaintiff must demonstrate that a defendant owed plaintiff a legal duty, that the defendant breached this duty, and that the breach was the proximate cause of an injury to the plaintiff. *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 887 (Minn. 2006).

In Minnesota, a landlord is under a duty to maintain the premises under his supervision and control so that they will be reasonably safe for use by his tenants and those who come upon the premises by reason of the tenants' occupation. *Lunde v. National Citizens Bank of Mankato*, 213 Minn. 278, 280, 6 N.W.2d 809, 810 (Minn. 1942). A landlord owes a duty of care to tenants for damages caused by defective conditions on the premises when 1) there is a hidden dangerous condition on the premises of which the landlord is aware, but the tenant is not; 2) the landlord has retained possession of common use areas; 3) the landlord repairs the premises, or 4) the land is leased for admission to the public. Gradjelick v. Hance, 646 N.W.2d 225, 231 (Minn. 2002).

Here, the district court erroneously found that respondents did not breach any duty owed to appellants, and thus may not be held liable for negligence.

A. Respondents Breached A Duty Of Care Owed To Appellants To Maintain Windows and Screens Properly Where Respondents Retained Control Of The Windows And Screens.

It is undisputed that respondents retained control over the repair and maintenance of the window screens at the Many Rivers Complex. (AA-16) Because respondents

retained control over this portion of the premises, they owed a duty of care to Kenny, including a duty to ensure the screens and windows were maintained properly. *Gradjelick*, 646 N.W.2d at 231.

There are material disputed facts as to whether or not respondents breached its duty of care to appellants. Respondents had notice of the danger of the windows and screens after the first child fell from a window at the Many Rivers Complex in June of 2006. In spite of this, they did not take the necessary steps to prevent another child from falling. Respondents did not effectively warn residents about the danger of the windows. Respondents sent two notices to residents warning them of the danger of the screens, however Arlene White only vaguely recalls seeing one of the notices, and does not recall what was written in them. (A. White Dep. at 12, 13) After painting the windows, respondents could have returned the screens to the state they were in prior to removal for painting, but for some reason did not. (*Id.* at 47) Both Arlene White and Dawn Steece had difficulty keeping the screens in the window. (*Id.* at 45) Arlene White stated that she only needed to touch the screens for them to fall out. (*Id.* at 48) Arlene White also stated that when the screens were installed with longer screws into the framework of the window, as they were prior to the summer 2006 painting, you could lean your head against the screen would remain secure. (*Id.*) Arlene White informed Perennial Management that she was concerned the screws had been removed because the screens again popped out so easily. (*Id.*) Arlene White believes that the mesh screen would have held Kenny in the apartment had they still been screwed into the framework with longer screw. (*Id.*)

Appellants' expert witness, Lanny R. Berke, contends that "the window and window area is unreasonably dangerous for its intended and forseeable use, to the intended and forseeable user, and in the intended and forseeable environment in which the system was being used." AA-22. Lanny Berke also states that the windows could have been altered cheaply and easily in order to prevent this type of fall in the future. *Id.* Also available to respondents are window screens that are designed with a stronger mesh screen as well as bracing to hold the screen in place if someone falls against it. *Id.* Given all of these options available to respondents, they could have easily avoided Kenny's fall had they not breached their duty of care.

Negligence and proximate cause are issues normally for the jury to decide. *Frey v. Montgomery Ward & Company*, 258 N.W.2d 782 (Minn. 1977). Therefore, whether respondents breached their duty of care is a question for a fact-finder, not a question to be answered at summary judgment. Because there are disputed material facts as to whether or not respondent breached a duty of care to appellants, summary judgment is inappropriate here.

B. Respondents Breached A Duty Of Care Owed To Appellants When They Negligently Repaired the Window Screens.

"[O]nce a landlord assumes the obligation of correcting a defect, the landlord "must bear the burden of failure to make a good job of it." *Wood v. Prudential Ins. Co. of America,* 212 Minn. 551, 556, 4 N.W.2d 617, 620 (1942), *See, e.g., Canada By and Through Landy v. McCarthy,* 567 N.W.2d 496, 504 (Minn.1997) (citing *Wood v. Prudential Ins. Co. of America,* 212 Minn. 551, 4 N.W.2d 617 (1942)). *See also*

Saturnini v. Rosenblum, 217 Minn. 147, 152, 14 N.W.2d 108,111 (1944) (if a landlord expressly agrees to maintain a premises, he has a duty to exercise reasonable care).

The court upheld a denial of summary judgment in a very similar case, *Drager v. Aluminum Indus. Corp.*, 495 N.W.2d 879 (Minn. Ct. App. 1993). In *Drager*, a child was injured as a result of a fall through a second-storey apartment window. *Drager* at 881. The court found that landlord regularly removed screens for cleaning and maintenance, and therefore had a duty to use due care in the maintenance of the screens. *Id.* at 885.

Here, as in *Drager*, respondent regularly removed and repaired screens and therefore had a duty to do so with due care. However, respondent continually, negligently repaired the window screens because screens continued to fall out of windows, even after they were only touched. (Steece Dep. at 8) Respondent had additional options to more securely attach the window screens to the frames as he did in Arlene White's unit. (A. White Dep. at 48) Had the screen been securely attached to the window frame, Arlene White believes Kenny would have been held inside. (*Id.*)

The district court cites several cases involving children falling out of windows, however none of these cases are from Minnesota and therefore none are controlling to the case at hand.

C. Respondents Breached A Duty Of Care Owed To Appellants Because Respondents Were Aware Of The Hidden Dangerous Condition Of The Apartment Window And Appellants Were Not.

Less than two months before Kenny fell to his death, another two-year-old child fell out of a window at Many Rivers West. (AA-3-4) That child also fell through an open window with a screen. (*Id.*) Respondents were, therefore, keenly aware of the

danger of children falling through the windows and screens of the building. While respondents sent notices to the residents, Arlene White only "vaguely" remembers the notice. (A. White Dep. at 12) Perennial Management does not know how many residents returned their signed notices. (01/21/10 Dep. of Diane Fenn Nelson ("Nelson Dep.") at 43) Perennial Management did not receive a signed notice from Arlene White, and they did not follow up with any residents who had not returned it. (*Id.* at 44) Clearly, Perennial Management was aware of the serious danger of a child falling out of the apartment windows, while it is far less clear that Arlene White appreciated the danger of the apartment windows, since she only vaguely recalls the notice and did not return her signed notice. Given the grave consequences and the abundant likelihood that children would encounter the apartment windows, respondents had a duty to ensure that each and every resident was provided proper notice, and as it concerned Arlene White, they failed to do so. Therefore, respondents breached a duty of care to appellants.

The district court therefore erred by granting summary judgment to defendants, because there is a material issue of fact as to whether or not respondents breached its duty to appellants and this court should reverse the district court's decision and remand the case for trial.

CONCLUSION

For all the foregoing reasons, the district court's grant of summary judgment in favor of respondents should be reversed, and the case remanded for trial.

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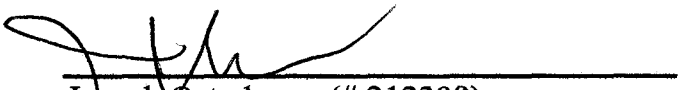

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