ORAL ARGUMENT – 09/28/04
03-0919
WESTERN INVESTMENTS V. URENA

AKERS: A tenant on tenant crime with no notice of a dangerous proclivities of the criminal co-tenant should not visit liability on an apartment complex. And where a party cannot and does not establish any kind of evidence of conduct of a premises owner, such that he could have prevented the sexual assault, summary judgment is absolutely appropriate.

This case involves the tragic and unexpected sexual assault a then 10-year old mentally challenged boy, Leo Urena. Leo Urena has since passed away as a result of unrelated matters. This lawsuit continues with his estate and his mother.

Michael Zuniga was another resident of this apartment complex. He was someone that no one had ever had any complaint about. He was someone that no one had any notion whatsoever that he had these pedophile like tendencies. These facts bear significantly from a mental issues of duty and causation which come before this court today.

At the outset, I think that it is very important to discuss what I believe is a significant disconnect between respondent's position and that of the court below. It is fundamental to any discussion of causation that a plaintiff is able to establish but for evidence of a breach of duty, which leads to an incident.

Here despite multiple opportunities, despite candidly being chastised every time we put pen to paper on this subject, there has not been one shred of evidence demonstrated or pointed out that would in any way indicate that the apartment complex failed to do something which might have prevented this incident.

WAINWRIGHT: Urena had some testimony according to the briefing that there was a lack of security; I think somewhere else had stated that there was no security guards. There is a response to that that says even if that's true, there is no tie to that being able to prevent the unfortunate event involving the child here. What exactly did she say about the lack of security of no guards? That's in the record I take it.

AKERS: She didn't see. She thought that the security company had been replaced or had been fired and not been replaced. And she hadn't seen the security guards in sometime.

WAINWRIGHT: And then your contention is even if that's true, there is no connection, no causation established between that and the incident?

AKERS: Yes.

HECHT: Does Timberwalk work in a case like this?

AKERS: No. It doesn't. And the reason why it doesn't is that this is a whole different character of crime. A tenant on tenant type case does not lend itself to the Timberwalk analysis. It doesn't...

HECHT: For example. If you had a high crime area, that's some indication that somebody is going to wander in from the outside and hurt somebody. But if no indication, relieved that the people inside are prone to violence it seems like to me.

AKERS: Exactly. The whole nature of these third party criminal ____ cases is that there is something inherent about the premises which makes it - that the crime is able to be accomplished there. Not that crime generally is out there, but that there is something unique about the premises that makes crime available there.

JEFFERSON: Can one of the unique things about the premise be a human being that has a proclivity, for example a pedophile or something. Would that qualify?

AKERS: Yes.

JEFFERSON: And is there evidence here that previous security guards knew about Zuniga and thought him to be dangerous to women on the premise?

AKERS: No. There is absolutely no evidence. There was confusion on that subject, which was subsequently I thought taken care of. There was the - in this case what we came to describe as the mole man, the person that had a distinctive mole and a distinctive haircut that had been - that they had worried about, thought was odd in someway. Later we came to find out in the course of the case and through the proceedings that the mole man was not Michael Zuniga. So, no. There is no evidence of anything that relates to Michael Zuniga, the pedophile.

J. Raul Gonzales wrote in Doe v. Boys Club, that the test for cause and fact is whether the negligent act or omission was a substantial factor in bringing about the injury. It is not enough that the conduct merely makes an injury possible. One must show that the negligence was the natural and probable result of the injuries. To correctly establish a breach of duty, that which is outlined by the CA, the CA would necessarily be required or ought to have demonstrated these factors as having caused the sexual assault on young Leo. However, when we look at the factors considered specifically by the CA, they do not answer that question at all as to how this incident could have been prevented.

First is the subject that J. Wainwright mentions, that being whether or not there was security? Indeed the summary judgment evidence is that there was no security there that Saturday morning at 10 o'clock. However, and presumed within that opinion is that somehow, someway security would have made a difference. That there is something about the presence of

security which would have some how or another affected what went on inside Michael Zuniga's apartment. Yet there is no evidence to suggest that there is anything about security which would have made any difference. Without that evidence summary judgment is appropriate.

Second, the CA strangely points out that the apartment complex was guilty of not having obtained prior police reports. Interestingly, they talk about the Timberwalk case as being the standard by which the case ought to be decided, and Timberwalk specifically says that a premises owner need not go out and get police reports and be aware of all that sort of crime. But even if they had there would have been nothing about those particular police reports would have placed them on notice of this incident, and would have in anyway affected Michael Zuniga's conduct.

Third, they point out that there were missing documents in some of the tenant files. There is no evidence that there were any missing documents about Michael Zuniga, and, in fact, Michael Zuniga if they had, and the record is undeveloped as to whether or not there was a criminal background check, but the record before the court was that a criminal background check did take place as to Mr. Zuniga after, and we know what it would have revealed. It would have revealed that Michael Zuniga in 1992 had a DWI, in 1993 he was driving without a license. Those things would not have placed anyone on notice that he was in anyway likely to commit these acts.

This case is not the typical third party criminal act at all. We aren't talking about an incident where a fence or a proper lock or lighting might somehow or another deter an evil doer. This incident happened inside an apartment over which the apartment complex had no control. A criminal who commits a criminal act inside a premise over which he has control ought to be subject to different standards. But yet the CA is intent on describing this as a typical premises liability case.

Okay. Let's do it. If this is indeed a typical premises liability case, the plaintiff has the obligation of showing that there is a dangerous condition of which the premises owner had actual and constructive knowledge and failed to act reasonably to do something about it. The defect here is Michael Zuniga. He is the sicko who was the defect on the premises. The same guy who jumped out the back of the window, never to be seen again when the police came to come and get him. The defect is not a generalize environment in this case. The defect is this individual. And therefore if we are going to use these____ premises liability standards, we ought to look to see whether or not there is any evidence of notice - actual or constructive that the apartment complex could have in anyway predicted that this man had these tendencies, that he was a defect. And of course, there isn't any of that evidence here. And that is why the Doe v. Boys Club analysis is so significant. Because there, no amount of checking would have made any difference in that case. Here, no amount of checking would have made any difference in this case. Therefore, no notice, no premises liability prima facie case.

WAINWRIGHT: If this similar incident had occurred a week after this incident, would your position change about the apartment's obligations?

AKERS: No. Because anything that occurred after would have placed us on notice of what occurred at the time.

WAINWRIGHT: Now would your position about the second incident, if you were involved in that one, have changed? There is some notice at least.

AKERS: If there was a second incident involving Michael Zuniga or some other sicko?

WAINWRIGHT: Either. If there was a similar incident a week later, and you're the lawyer involved in the second incident involving different tenants, but the same apartment complex, would your position change?

AKERS: I think that the - my position as to whether or not Timberwalk applies or whether or not...

WAINWRIGHT: In the outcome of the case.

AKERS: Then it would be a totally, completely different analysis as to whether or not the apartment complex had acted prudently with that notice in order to provide notice. I don't believe in any of these cases, so it's hard for me to acknowledge that anyone can ever predict random crime. One of these other incidents is a wife stabbing her husband. She is in jail. That doesn't provide evidence to anyone that some other husband and wife are likely to stab each other in their apartment in my mind.

WAINWRIGHT: Would you agree in my hypothetical the apartment would have some obligation to do something, and not just nothing and let another incident happen a week later that's similar?

AKERS: I think that a standard of care, which I am aware in the apartment industry, is that they would provide notice to the tenants that this had occurred.

WAINWRIGHT: So to a large degree your position here turns on notice.

AKERS: Yes. Usually turns on notice.

WAINWRIGHT: Which informs duty and causation?

AKERS: Yes. If we look at the Timberwalk analysis, presuming I am wrong and the Timberwalk ought to apply, Timberwalk requires a similarity of crimes. The reason is as I said that the nature of foreseeability requires an analysis of the premises itself: what about that gives rise to that particular crime? And there ought to be a nexus between the type of crimes that give rise to that foreseeability and that which is complained about. Here the CA looked at the 8 crimes that had occurred in the prior of 3 years. They characterized them as violent. These 8 crimes, however, we

know involved one domestic disturbance, one hate crime, an adult on adult attempted sexual assault, three nighttime robberies and two very strange murders. None even remotely resemble the sexual assault on a child at 10 o'clock on a Saturday morning.

The duty imposed on a premises owner relating to the criminal acts of third party exists where the crime is of the character complained about that could be reasonably anticipated. There needs to be something about these crimes to suggest the one shadow of a second that this incident could be predicted. But it's not there. Instead, the CA characterizes all of these crimes as violent and says, since all these crimes are violent, and this is a violent crime, it falls under that umbrella. Well that is akin to saying that once there has been a history of some violent crime on the premises, all of a sudden you become an insurer for those premises without looking at what the nature of the crime might be. For instance, what about an act of terrorism? Would the apartment complex be responsible for an act of terrorism on its complex, because in the past there had been these 8 incidents of violent crime? That doesn't make any sense.

WAINWRIGHT: How much weight should we place on the policies recommended by the red Book? The CA talks about that some. You mentioned that Timberwalk indicates that there is no duty to go out, assuming Timberwalk applies, and have the apartment get police reports. The Red book recommends getting police reports and the apartment complex here says that they follow the red book, but they didn't get police reports. What extent should that weigh in to our decision?

AKERS: Absolutely none.

WAINWRIGHT: To what extent should that inform the duty that the apartment undertakes?

AKERS: There is a difference between a legal duty, and a standard of care that an industry might adopt. If the red book suggests that sort of thing it makes sense that one go about that. When I appear to the TC for summary judgment purposes, I _____ to do that. I have no legal responsibility to acquire that. If I find myself in front of a jury, I may have to explain myself. So those are two different things. Here, in this case, it makes absolutely no difference whatsoever because here it couldn't possibly have had anything to do with this incident.

WAINWRIGHT: And even if they got police reports, you talked about the ones that they would have obtained, and background information on Mr. Zuniga you say wouldn't have led to any notice about his propensity regarding children. I understand that. We ought to know however take a close look at industry practice in determining the duty of industry actors don't' we under the theory that they should know what they are doing and what they should be doing perhaps with more expertise than the court would bring to bear on the issue? So shouldn't it have absolutely no weight in determining the apartment duty or some?

AKERS: I think that it ought to be a consideration. Surely. But what especially in these days and times of looking over one's shoulder at being sued, not by what is reasonable or not reasonable, what is appropriate conduct and what is not appropriate, but instead making sure that you

are not going to find yourself an unwilling victim of a lawsuit, and, therefore, causing someone to take extra and additional steps such as might be recommended in the red book, that is one thing as opposed to what ought to be a legal requirement as has been recommended by this court in Timberwalk.

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RESPONDENT

LISTON: I want to respond quickly to what was said by petitioner's counsel. First, he said there was no notice of the dangerous proclivities of Mr. Zuniga. There is evidence of the dangerous proclivities of that man. There are two sentences in our response to the summary judgment. It's page 6 of our response to summary judgment. It's in the record. "In addition, one of the witnesses testified that the assailant, Mr. Zuniga, had a reputation for seducing boys by drugging them and taking advantage of them." See relevant portions of the deposition of Olga Grimaldo, that's Leo's aunt, attached hereto as ex. 8, pages 63-72. Because the residents were quite familiar with the assailant, see also ex. 3, that's the deposition of _____ Rodriguez, a friend of the family, at page 30-31, the jury can be allowed to presume that the management by way of circumstantial evidence knew of these propensities as well."

HECHT: How?

LISTON: The testimony of Ms. Rodriguez was that she went in and talked to Katy Michon, the apartment manager, and Ms. Michon said, well we're aware of the family and we will look into it. So there is more than circumstantial evidence. Ms. Rodriguez did speak to someone with the apartments and talked to her about Mr. Zuniga. So there is some evidence that the apartment complex had been made aware of the actions of Mr. Zuniga and what he was doing. And the words used...

BRISTER: After or before the incident?

LISTON: I believe with Ms. Rodriguez it was before the incident or right around the time Olga Grimaldo spoke after her.

WAINWRIGHT: First you said the jury should be allowed to infer that this knowledge that the tenants had got to the management. Then when you were asked by J. Hecht, you said there is some evidence that Rodriguez talked to the apartment management. So which is it?

LISTON: She said in her deposition - both of the women that I quoted from did speak to the management. One of those was at a time after. After Leo had been assaulted they went to Ms. Katy Michon and told her about what had happened and why didn't you call the police or what have you. And then on another occasion I don't believe the record is specific as to what time it was, but she went to Ms. Meshan and said, there's this person here, this Zuniga and - what's also clear from the record is that the tenants were certainly aware, the family of _____, was aware from, the word

in the complex was that this Zuniga had been assaulting boys in a similar fashion.

BRISTER: Then why in the world did they let them walk across the street by himself?

LISTON: Well they had two women there that morning watching him.

WAINWRIGHT: Not when he walked across the street.

LISTON: He did what he shouldn't have done. He was 10 years old, and a mentally challenged young man.

WAINWRIGHT: The CA, as I recall, could be wrong. It doesn't talk about this deposition testimony you just cited to us, that purports to put the apartment complex on specific notice of, if not Zuniga, of the family I think as you said. That seems fairly important.

LISTON: I can't answer why it's not in the CA's opinion. They do not quote it. That is true. What they do talk about, and I think is important, is the issue of police reports. Our argument is not and the CA's opinion is not the argument that this complex should have gone down and received a police report on this individual before he checked in. The case of Doe v. Boys Club finds that that is not a case in fact. So that is a dead on arrival issue. What they are talking about here in the opinion is police reports from the area, and that's what we're talking about too. The testimony of these two ladies, one mentions that she called the police. And the evidence we believe shows that had the apartments been requesting police reports about incidents going on in the area it would have been more likely than not that Zuniga's name and activities in that area would have come up. We're not making the argument that they should have checked his police record before, which is basically at page 99 of the record, that he had a clean record other than the DWI.

HECHT: Then how would they come up if you just check them more often? You said if you checked in the area more often, then his activities would be more likely to come to life. How would that be the case? If you call the police everyday, you still wouldn't know.

LISTON: If Zuniga's activities that these ladies testify about in their deposition, if those were reported, then...

HECHT: But they weren't were they?

LISTON: We don't have evidence in the record. We have resident testimony that said from what they heard that he had been doing this type of activity in the English Oaks apartment complex.

OWEN: What should the apartment complex have done that it didn't do that could have prevented this?

LISTON: Done a better job of keeping tenant files. The CA's found that just keeping tabs on the tenants, not spying on them, just keeping a folder on them...

OWEN: What does the evidence show that had they kept a folder on Zuniga what would that have shown about Zuniga?

LISTON: It would have been more likely than not that his activity, he had a reputation, it's clear from the two lady's testimony...

BRISTER: So all you have to do to get rid of your neighbors in your apartment complex is tell the manager that guys got a reputation for being a pedophile. The apartment complex has got to kick them out. That's going to cause all kinds of privacy, constitutional...that's going to be abused more than it's going to help isn't it?

LISTON: But if it's more than one and if the nature of the complaints is something that can be verified and looked into.

BRISTER: We can. We've looked and there is no police report, any government record of any kind that Zuniga has every done anything like this. But what your position is, if one neighbor completely makes up a reputation about a bad guy, the apartment complex has got to kick him out.

LISTON: No. That's where the police reports, the police runs come in. Yes, a tenant could conceivably run down to the apartment manager, make up a story, but the police runs I would submit are different.

BRISTER: But there wouldn't be any on Zuniga.

LISTON: There aren't any in this record.

OWEN: What's in the record that says here's what the apartment complex should have done or not done that might have prevented this?

LISTON: They need to keep better files, better information on the individual tenants.

JEFFERSON: Would added security guards have prevented this? What's the evidence that that would have stopped this incident that happened inside the apartment?

LISTON: I don't know if under Timberwalk we are required to show specifically that the security guard would have been right there on the scene Saturday morning. So it would make it less likely.

JEFFERSON: There's got to be some evidence that the actions that you fault them for not taking would have prevented this from happening. And I think we're trying to find out where is that

evidence here? Is it in an expert report? How can we make that determination?

LISTON: Go back to the red book. The red book talks about what an apartment owner should do. One of the things is, get periodic police runs on other crimes that have happened in the area.

O'NEILL: Let's say there had been police runs on Zuniga. Let's say that you had found three reports that said, complaints have been made about him in this regard. What then would the apartment complex, what would they then have to do?

LISTON: Tell their security guards to keep a little bit closer eye on Mr. Zuniga and possibly start looking into him more closely to consider whether they want him to keep living in that complex.

OWEN: Is that evidence in the record?

LISTON: No. That was a hypothetical. The way the CA addressed the case they determined we did not have an ordinary negligence cause of action. Found that the plaintiff fell square within Timberwalk and then applied the five standards of Timberwalk. There's a published opinion. I'm quite confident a comparison of the facts in this case with the facts of Timberwalk reveal that Timberwalk has been faithfully followed and that the facts of this case fall within Timberwalk as a matter of law.

Let me go through those quickly. The location and where the crimes happened. Timberwalk was the case like many that were using general crime in the area, in a bad part of town type arguments. This case we put 8 police reports in the record and 7 of them were actual crimes that happened there on the property. So this wasn't a case where we were saying well it's in a bad part of town, therefore, they should watch out for things generally because it's a bad part of town. These were property specific crimes. Two, the recency. We went back 31 months before the incident. The incident was Nov. 1999. That ties into the frequency. There was two crimes in 1997, two crimes in 1998, and four in 1999 trending upwards. The similarity that the petitioner hit on, and in their briefing they are quite clear. They want to say this is far different than the sexual abuse of a child is different because it takes place in a private place and all of that. However, Timberwalk itself teaches that, the similarity aspect is addressing violent crimes to the person. Timberwalk is not interested in domestic violence. That's much less probative or let's say nonviolent crimes in the apartment complex. To quote Timberwalk, "a string of assaults and robberies in an apartment complex makes the risk of other violent crimes like murder and rape foreseeable." On the other hand, a spade of domestic violence in the complex does not ____ third party sexual assault." That's at 758 of Timberwalk. That's a key point that petitioner made. We submit these crimes are similar and the similarity is that they are violent crimes against a person, against tenants.

Five, the publicity. Kate Michon, she is the apartment manager. She testifies in her deposition that she is aware of the murders, that's around page 102 of her deposition. The

publicity unlike a lot of cases where they are relying on this was reported on the news, therefore, the complex should have known. It's none of that. This is the apartment complex, the lady running the place was aware and testified she was aware.

I do believe this case comes back to once we have our Timberwalk established okay where do we go? I believe that's the Melon decision out of this court. We just don't stop at Timberwalk and say that's fine, they are there, they are liable. There has to be a duty. To quote J. ____, there's negligence in the air. Something that these defendants did has to - the breach of duty has to go back to the foreseeability we talked about. I believe this case satisfies everything that Melon, all the concerns in Melon. We have a foreseeable victim, a tenant. You talk about the classifications of the victim. Well she would be a licensee. She certainly has the right and should be expected to be there. And Leo also of course is on the application for rent. So both of the victims is foreseeable. The foreseeability of the assailant, and that's what I started with, he is a tenant also. That's admitted. And his proclivities are known certainly to Ms. Rodriguez, members of his family, and the tenants. And one of them said that she did talk to the apartment manager about Zuniga and what Zuniga was doing. So that's where the foreseeability comes in. Well what should they have done? Should have had better contacts with tenants, have better contacts, kept better tabs on tenants to find out that one of them was a very bad apple and doing these specific things. The foreseeability of the actual crime, if you read what Ms. Ola Grimaldo, she says that she was actually aware that the man was homosexual pedophile. He prayed on young boys.

In this case, when you apply the Melon analysis, there is a foreseeable victim, a foreseeability of the assailants. Some evidence that Zuniga, that they had been told or that they should have know at the complex about Zuniga and what he was like. And also certainly about what type of man Zuniga was.

To sum up. The 1st CA correctly applied the Timberwalk analysis and found that the general possibility of violent crime would be foreseeable. And then it applied the duty analysis and found that the specific duties (that's the last paragraph of the appeals opinion) they found that the duties that they breached specifically the failure to keep such things as police runs and items required by the red book that that relates back to this particular attack and that that is why summary judgment in this case was improper.

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REBUTTAL

AKERS: I thought I knew this record pretty well. I don't recall anything in the record at all that established any notice or opportunity for notice of the apartment complex of any tendencies on the part of Zuniga prior to this incident. So if the record is there, I guess I stand corrected. But now, today, this moment, we have for the first time the evidence or the claim of what it is that the apartment complex was supposed to have done. And they were supposed to have kept better tenant files and maybe on the basis of the reputation and the comments of these tenants, whether or not they were before or after somehow or another we were supposed to have done something about that. Part

of the problem is, in this record that was not in any way presented to the TC, even if it doesn't makes sense, that somehow or another we were privileged to start kicking people out with whom we have a lease contract on the basis of someone saying something negative about them, and that that means that we have a duty. And the failure to breach our lease contract means that we are liable in tort on down the road, that is illogical on its face. Nevertheless, this is the first time, and that was not present to the TC. The TC has the - we owe it to our TC to give him that before him and he just didn't have it.

One of the things that counsel suggests is that a security guard is presumed to have made a difference. There is a case not cited. It's a California case. It's Saelzer v. Advanced Group, 23 P3d 1143, 2001. It stands for the proposition that a plaintiff must establish by nonspeculative evidence some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures. That ought to be the law in Texas if it isn't.

The Melon case which came out of a brilliant TC had a plurality opinion which stands for the proposition that helps us. It stands for the proposition in the plurality there needs to be a link between the conduct and the victim, and the risk and the victim. And here there is absolutely no evidence whatsoever as to any suggestion that there could be a link in anyway to suggest that poor Leo Urena was going to be victimized that particular day.

HECHT: In a case when an outsider comes on to the premises, you think Timberwalk works okay or not?

AKERS: Absolutely. Timberwalk is great law. And there is no reason for the court to revisit Timberwalk. It just doesn't apply to a tenant on a tenant case. If for instance there was no crime on this premises whatsoever, but Michael Zuniga was indeed a well known pedophile that had all of these tendencies, had committed other acts inside of his premises and the apartment complex knew about it, I think that they probably had a duty to say something about it. Yet if we look at the Timberwalk analysis, it wouldn't get us anywhere near where we wanted to be as to the ordinary duty of care of an apartment complex. That would be in the red book as well.