STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE WHITT, by her Next Friend JANE HANSON, and NICOLE RABY, by her Next Friend SHIRLEEN RABY,

Plaintiffs-Appellants,

v

JOHN KAPLAN and MARIAN KAPLAN,

Defendants-Appellees,

and

HOWARD JAY KAPLAN,

Defendant.

UNPUBLISHED
March 21, 1997

No. 185673
Oakland Circuit Court
No. 93-467054

Before: White, P.J., and Griffin and D.C. Kolenda,* JJ.

PER CURIAM.

Plaintiffs appeal the circuit court's orders granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiffs' motion for reconsideration in this negligence and premises liability action. We affirm.

This case arises from Howard Kaplan's sexual abuse of plaintiffs Stephanie Whitt[1] and Nicole Raby[2] around the fall of 1992 at an Oak Park home owned by defendants, where Howard was living.[3] John and Marian Kaplan (defendants) are Howard's parents and had been awarded exclusive temporary custody of Howard's two minor daughters, Nicole[4] and Ashleigh Kaplan, in May 1992 as a result of post-divorce custody litigation in Ohio. Plaintiffs, who were seven and eight years old at pertinent times, were playmates of Nicole and Ashleigh Kaplan. Howard was approximately thirty-eight years old in late May 1992, and had just been released from a federal penitentiary on an appeal

* Circuit judge, sitting on the Court of Appeals by assignment.

bond when he began living in defendants' Oak Park home.[5] He was arrested on the instant charges in November 1992 and convicted of multiple counts of criminal sexual conduct of plaintiffs and several other victims, including his daughter, Nicole.

Plaintiffs' first amended complaint alleged claims of negligent supervision and premises liability against defendants. The circuit court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), concluding that a tenancy-at-will was created between defendants and Howard, and that the love and affection between them was adequate consideration to create a tenancy. The court further concluded that there was no evidence that defendants had any knowledge that defendant had assaulted or was assaulting plaintiffs, and that plaintiffs failed to present a genuine issue of fact whether defendants knew that their son was a molester. As to the latter, the court concluded that the allegations of sexual assault during Howard's divorce were insufficient to create a genuine issue of fact. The court further noted that even if plaintiff had presented a genuine issue of fact as to defendants' knowledge, summary disposition would still be appropriate because there was no evidence that defendants had any knowledge that any criminal activity was occurring in the Oak Park house. The court concluded that summary disposition was appropriate because there were no genuine issues of fact which would give rise to a duty to plaintiffs.

Plaintiffs moved for reconsideration, arguing that the court's ruling that there were no facts to present to a jury that would give rise to a duty on defendants' part was based on an incomplete presentation of relevant facts relating to the issue whether defendants knew about their son's criminal behavior. Plaintiffs attached affidavits of Caroline Sanders and Alicia Krause and excerpts from the deposition of Joyce Ragles. Caroline Sanders' affidavit stated that she was Howard's girlfriend from 1989 to 1991, during which time she lived in defendants' Oak Park home. The affidavit further stated that, prior to January 1992, she spoke with defendants at their home regarding unusual activity she had witnessed, specifically, Howard's constant showering with his daughter, Nicole. Sanders' affidavit further stated that John Kaplan's response was that he too was not comfortable with Howard's taking showers with Nicole Kaplan. Sanders' affidavit stated that she also made defendants aware, prior to 1992, that there was an unusual discharge in Nicole's underwear, that Nicole was excessively masturbating, that Nicole's clothes were found on Howard's dresser on multiple occasions, and that Nicole would be wearing only a t-shirt in the late afternoon or early evening when Sanders arrived from work. Finally, Sanders' affidavit stated that in response, John Kaplan asked that she not leave the children alone with Howard.

Alicia Krause's affidavit stated that she was employed by defendants from the fall of 1992 through 1993 as nanny for Nicole and Ashleigh Kaplan. The affidavit stated that after Howard's arrest and incarceration, she found a box in defendants' West Bloomfield home which contained photographs, including a photograph of Howard and Nicole showering together, in which Howard appeared to be nude and he and Nicole were touching; and a photograph of three girls, which she believed to be Stephanie Whitt, and Nicole and Ashleigh Kaplan, laying down on top of sleeping bags with their feet closer to the camera than their heads and their panties exposed. Krause's affidavit further stated that she was present in defendants' West Bloomfield home on several occasions when Howard called from

jail and that defendants allowed Howard to speak to Nicole, even though it was Krause's understanding that a court order prohibited contact between Howard and Nicole.

Plaintiffs also attached deposition testimony of Shirley Ragels, the maternal grandmother of Nicole and Ashleigh Kaplan, in which she testified that during her daughter and Howard's divorce proceedings [in approximately 1987] she told Marian Kaplan that Nicole Kaplan, at age three, had told her that her father had abused her. Ragels testified that Marian Kaplan said she did not believe it.

The circuit court denied plaintiffs' motion for reconsideration.

I

Plaintiffs first argue that the circuit court erred by granting summary disposition where it was foreseeable to defendants that plaintiffs would be sexually molested in defendants' Oak Park house and it was reasonably foreseeable that plaintiffs would be drawn to the premises by the presence of defendants' granddaughters. Plaintiffs argue that the parties thus had a "special relationship" and that defendants owed plaintiffs a duty of care.

MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). The court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), reh den 448 Mich 1202 (1995). We review a grant of summary disposition de novo. *Jackhill*, *supra* at 117.

To establish a prima facie case of negligence, plaintiffs must introduce evidence sufficient to establish that (1) defendants owed a duty to plaintiffs, (2) defendants breached that duty, (3) defendants' breach was a proximate cause of plaintiffs' injuries, and (4) plaintiffs suffered damages. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). Whether defendants owed a duty to plaintiffs to avoid negligent conduct in the circumstances presented is generally a question of law for the court. *Schmidt v Youngs*, 215 Mich App 222, 224; 544 NW2d 743 (1996). However, where there are factual circumstances which give rise to a duty, the existence or nonexistence of those facts must be decided by a jury. *Aisner v Lafayette Towers*, 129 Mich App 642; 341 NW2d 852 (1983). This Court reviews questions of law de novo. *Burgess v Clark*, 215 Mich App 542; 547 NW2d 59 (1996).

Generally, a private person has no duty to protect another from criminal attack by a third person absent a special relationship or circumstance. *Roberts v Pinkins*, 171 Mich App 648, 652; 430 NW2d 808 (1988). This rule is equally applicable to property owners who are sued for the criminal attack of a third person committed on their property. *Id.* The law generally recognizes a special relationship between landlord and tenant, and invitor and invitee. *Dykema v Gus Macker Enterprises*,

196 Mich App 6, 8; 492 NW2d 472 (1992). In determining whether a "special relationship or circumstance" exists, and thus a legal duty to act, the court must balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. *Roberts, supra* at 648. Other factors which may give rise to a duty include the foreseeability of the criminal activity, the defendant's ability to comply with the proposed duty, the victim's inability to protect him or herself from the criminal activity, the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant. *Id.* at 652-653, citing *Anno: Comment note--private person's duty and liability for failure to protect another against criminal attack by third person,* 10 ALR3d 619, § 2, pp 624-625; see also *Babula v Robertson,* 212 Mich App 45, 49; 546 NW2d 255 (1995).

Defendants do not dispute that Nicole and Ashleigh Kaplan spent a considerable amount of time at defendants' Oak Park house with their father, including overnight visits. Nor do defendants dispute that they knew that plaintiffs spent considerable amounts of time, including overnights, at defendants' Oak Park home when defendants' granddaughters were there.

We first consider whether plaintiffs succeeded in establishing the existence of a special relationship.

> The rationale behind imposing a legal duty to act in these special relationships is based on the element of control. In a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety. Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself. [*Dykema,* 196 Mich App at 8-9.]

In the present case, evidence established that Howard lived approximately twenty miles from defendants in a house they owned. Defendants had custody of Howard's daughters, but allowed them to spend substantial amounts of time at his residence in opposition to the wishes of their guardian ad litem. With their parents' permission, plaintiffs would often go to Howard's residence to play with the Kaplan girls. Howard would sometimes drive his daughters and plaintiffs to defendants' house to visit. The lower court record indicates, contrary to plaintiffs' allegations, that defendants drove Raby to Howard's house only once and never did so with Whitt. Indeed, the record showed that plaintiffs were never left alone in defendants' supervision.

Plaintiffs also submitted evidence they argue establishes defendants' knowledge of Howard's pedophilia. Although we believe this is a close question, we must disagree. Nicole and Ashleigh Kaplan's guardian ad litem, John Zoller, was concerned about the time Nicole and Ashleigh were spending with Howard while they were in defendants' custody. There is no indication, however, that Zoller's concern stemmed from a suspicion of sexual abuse. Also, on one occasion Marian Kaplan

drove to Howard's residence and found Whitt on his front porch. She asked Whitt why she was not inside the house. Whitt responded that she did "not want to be in there with him," but did not state why. Nicole Kaplan denied at her father's criminal trial that he had sexually molested her. Plaintiffs allege that defendants' subsequent stipulation that Howard Kaplan molested Nicole Kaplan indicates that they knew all along of his criminal behavior. Plaintiffs submitted additional evidence on reconsideration which indicated that defendants were aware in 1991 that Howard showered with Nicole when she was approximately seven years old.

We conclude that this evidence was insufficient to establish the existence of a special relationship between defendants and plaintiffs. The evidence presented does not establish that defendants assumed a supervisory role over plaintiffs which would impose upon them a duty to keep the girls reasonably safe from sexual predation by their son. See *Phillips*, *supra*. We cannot conclude that plaintiffs were present at Howard's residence only by virtue of defendants' acts or omissions. Further, although for purposes of the motion we assume defendants knew that Howard had showered with Nicole, and that Howard's ex-wife had accused him of sexual abuse of his daughter during divorce proceedings, we cannot equate such with knowledge that Howard would molest or act criminally against plaintiffs in defendants' Oak Park home in 1992.

Plaintiffs have not further demonstrated the existence of a special relationship which would obligate defendants to protect plaintiffs from Howard's criminal acts. They attempted to do so by arguing the existence of a special relationship between defendants and Howard based on familial relationship.

Typically, courts are reluctant to find family members liable for an adult assailant's actions when the liability is premised on negligence-based actions which charge the family member with such things as failure to warn of the assailant's dangerous propensities. *Anno: Liability of Adult Assailant's Family to Third Party for Physical Assault*, 25 ALR5th 1, 11. For example, in *Bell & Hudson v Buhl Realty*, 185 Mich App 714, 719; 462 NW2d 851 (1990), relied on by defendants, this Court held that a familial relationship was insufficient to impose a duty on the brother of an assailant to protect the general public from his brother. The assailant's brother had been advised, shortly after the assailant left home armed with a gun and gasoline, that the assailant was on his way to a law firm to get back a retainer fee he had paid. The brother did not call the law firm, but walked to it and arrived after the assailant had killed one person, injured another, and set a fire. *Id.* at 716. This Court rejected "the premise that this family relationship is sufficient to impose a duty on [the assailant's brother] to protect the general public from his brother." *Id.* at 718-719. See also *Petersen v Heflin*, 163 Mich App 402, 407; 413 NW2d 810 (1987). Moreover, plaintiffs have not alleged that defendants possessed a special ability to control the criminal acts of their adult son. In sum, plaintiffs failed to establish the existence of a special relationship, either between defendants and plaintiffs or defendants and Howard Kaplan, which would obligate defendants to protect plaintiffs from Howard's criminal acts.

Although we have found no factually similar Michigan cases, defendant cites two similar cases from foreign jurisdictions, *Apple v Tracy*, 34 Mass App Ct 560; 613 NE2d 928 (1993), and *Rozycki v Pelley*, 199 NJ Super 571; 489 A2d 1272 (1984), for the proposition that non-mental health

professionals have no duty to warn neighborhood children or their parents that a house guest or spouse is a known or convicted child molester. In *Apple*, a houseguest of the defendant homeowner who had been recently released from prison for sexually assaulting a child, sexually assaulted a neighborhood boy. The court affirmed the lower court's ruling that a social host does not have a duty to protect third persons from criminal acts of a social guest absent events that would lead a reasonable host to anticipate danger. *Id.* at 929.

In *Rozycki, supra*, the court declined to extend a duty to warn to a wife who knew of her husband's pedophilia. The husband was alleged to have assaulted several children at the rear of the defendants' home, in the swimming pool.

II

Plaintiffs also argue that defendants owed a duty of care to plaintiffs as invitees, that the circuit court's analysis was erroneous because there was no landlord-tenant relationship between defendants and Howard, and that the special relationship, i.e., invitor-invitee, between defendants and plaintiffs was a superseding ground of defendants' duty.

Generally, landowners are liable for known dangerous conditions of their property and for dangerous conditions which might be discovered with reasonable care. *Little v Howard Johnson Co*, 183 Mich App 675, 678; 455 NW2d 390 (1990). However, a landowner owes a child social guest the duty of care owed to an invitee, i.e., to exercise reasonable care to prevent injury to the child. *Klimek v Drzewiecki*, 135 Mich App 115, 119-120; 352 NW2d 361 (1984). The law recognizes a special relationship between invitor and invitee. *Dykema*, 196 Mich App at 8. The circuit court thus erred in concluding that defendants owed plaintiffs no duty as a matter of law.

Premises liability is conditioned on the presence of both possession and control over the land. *Merrit v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). A possessor is defined as (1) a person who is in occupation of the land with intent to control it, or (2) a person who has been in occupation of land with intent to control it, if no other person subsequently occupied it with intent to control it, or (3) a person who is entitled to immediate occupation of the land, if no other person is in possession under (1) or (2). *Id.*

Defendants were the sole owners of the Oak Park house in which Howard resided, paid bills associated with ownership, and retained keys to the property, and Marian Kaplan went to the Oak Park house three to four times a week. There was no evidence presented of a lease, express or implied. Rather, the evidence viewed in a light most favorable to plaintiffs indicates that defendants were allowing Howard to stay in their Oak Park home free of charge, while paying the bills for the house. We conclude that the circuit court's determination that defendants and Howard had a landlord-tenant relationship involved impermissible fact-finding and was premature. However, even assuming that defendants retained possession and control over the premises, we still cannot conclude that they had the requisite knowledge that Howard would harm plaintiffs, for the reasons discussed above.

Thus, we conclude that the trial court arrived at the right result, albeit for the wrong reason, and reversal is not warranted. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994). We therefore affirm the grant of defendants' motion for summary disposition and denial of plaintiffs' motion for reconsideration.

III

We disagree with plaintiffs' argument that the trial court abused its discretion in issuing a protective order preventing plaintiffs from deposing Nicole and Ashleigh Kaplan. We review the trial court's decision to grant or deny discovery for an abuse of discretion. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994); *Marketos v American Employers Ins Co*, 185 Mich App 179, 197-198; 460 NW2d 272 (1990); see also MCR 2.302(C). An abuse of discretion exists where the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Sparks v Sparks*, 440 Mich 141, 150 n 11; 485 NW2d 893 (1992).

MCR 2.302(C) invests courts with a broad range of discretion to issue orders limiting discovery to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense." *Marketos, supra*. Nicole and Ashleigh were ten and seven years old, respectively, at the time plaintiffs sought to depose them regarding their father's sexual abuse of plaintiffs and them. Both children had been through an unusual amount of trauma, involving not only the instant allegations, but also their mother's death some time after May 1992. Their psychologist thought it would be counterproductive to their treatment for plaintiffs to depose the children on the subject of Howard's sexual abuse. On these facts, the trial court's decision to issue a protective order to prevent them from being deposed was not an abuse of discretion. The court did not foreclose discovery by interrogatories to the children.

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

[1] Date of birth June 19, 1984.

[2] Date of birth March 3, 1984.

[3] We note that defendants objected to plaintiffs' enlargement of the record on appeal. The facts as stated herein were taken only from the record before the circuit court. *Harkins v Department of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994).

[4] The pleadings state that Nicole Kaplan was nine years old at the time the original complaint was filed, and in the same grade as Stephanie Whitt. The pleadings also state that plaintiffs were Nicole Kaplan's age.

[5] We glean from the record that Howard had lived in defendants' Oak Park home before, some time during his marriage, which lasted from 1983 to 1987, and before he went to prison in June 1990. Other persons occupied the house subsequently.