MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cember Wamsley, *as Personal Representative of the Estate of* Genia Wamsley,

Appellant-Plaintiff,

v.

Tree City Village and New Generation Management, Inc.,

Appellees-Defendants,

February 22, 2021

Court of Appeals Case No. 20A-CT-1894

Appeal from the Decatur Superior Court

The Honorable Matthew D. Bailey, Judge

Trial Court Cause No. 16D01-1609-CT-410

Robb, Judge.

Case Summary and Issue

[1] Cember Wamsley, as Personal Representative of the Estate of Genia Wamsley ("Plaintiff"), appeals the trial court's order granting summary judgment in favor of Tree City Village and New Generation Management, Inc. (collectively, "Landlords"). Plaintiff raises two issues which we consolidate and restate as whether the trial court properly granted summary judgment in favor of Landlords. Concluding it did, we affirm.

Facts and Procedural History

[2] New Generation Management, Inc. is a property management company that operates the Tree City Village apartment complex in Greensburg, Indiana. In 2016, Genia Wamsley and Matthew Joseph were tenants in neighboring units at Tree City Village. The two units shared a common wall. On March 7, 2016, Joseph was inside his apartment cleaning his personal firearm and Wamsley was inside her own apartment near the common wall. While cleaning, Joseph accidentally discharged the firearm, which penetrated the common wall and struck Wamsley. Wamsley was taken to the hospital and underwent surgery. After being discharged, Wamsley had various physical and psychological symptoms due to her injuries. Although Joseph maintained the discharge was an accident, he was later charged with and convicted of criminal recklessness, a Level 6 felony. He appealed his conviction and a panel of this court affirmed. *See Joseph v. State*, 126 N.E.3d 810 (Ind. Ct. App. 2019), *trans. denied*.

[3] On September 13, 2016, Wamsley filed a complaint for damages against Landlords alleging negligence and nuisance.[1] She claimed that Landlords owed her a duty of care and Landlords breached that duty by "not acting reasonably to protect [her] safety." Appellees' Appendix, Volume 2 at 6. She also claimed, "The actions of the [Landlords] are injurious to health, indecent, offensive to the senses, and an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property." *Id.* Wamsley later died from unrelated causes and an estate was opened. Wamsley's daughter, Cember Wamsley, was appointed personal representative of the estate and was substituted for Wamsley as plaintiff in the instant action.

[4] On March 17, 2020, Landlords filed a motion for summary judgment and a supporting brief. *See* Appellant's Appendix, Volume 2 at 15-39. Landlords argued they were not liable for negligence because they owed no duty to protect Wamsley from the harm she suffered, i.e., an accidental gunshot wound, as it was not reasonably foreseeable. Landlords also claimed they were not liable for nuisance because Plaintiff's claim was rooted in Wamsley's personal injury, not interference with personal or public property rights.

[5] In support of their motion, Landlords designated evidence, including Wamsley and Joseph's respective lease agreements. *See id.* at 40. Notably, both tenants signed a Crime Free Lease Addendum to their lease agreements, which

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[1] Wamsley also named Joseph as a defendant. A default judgment was entered against him and he does not participate in this appeal. *See* Appellant's Appendix, Volume 2 at 2-12.

provided, in pertinent part: "Resident . . . shall not engage in any illegal activity, . . . including but not limited to the unlawful discharge of firearms, on or near the dwelling unit premises[.]" *Id.* at 53, 65. The addendum also provided that any violation of the provision constituted good cause for termination of the tenancy. Plaintiff filed its response and designated evidence. A hearing was held on August 28. On September 25, 2020, the trial court entered an order granting summary judgment in Landlords' favor. Plaintiff now appeals.

Discussion and Decision

I. Standard of Review

[6] Summary judgment is a tool which allows a trial court to dispose of cases where only legal issues exist. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). When reviewing the grant of summary judgment, we apply the same test as the trial court. *Converse v. Elkhart Gen. Hosp., Inc.*, 120 N.E.3d 621, 624 (Ind. Ct. App. 2019). Summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Sedam v. 2JR Pizza Enters., LLC*, 84 N.E.3d 1174, 1176 (Ind. 2017). The moving party bears the initial burden of showing the absence of any genuine issue of material fact as to a determinative issue. *Hughley*, 15 N.E.3d at 1003.

[7] Once the movant for summary judgment has established that no genuine issue of material fact exists, the nonmovant may not rest on its pleadings but must set

forth specific facts which show the existence of a genuine issue for trial. *Perkins v. Fillio*, 119 N.E.3d 1106, 1110 (Ind. Ct. App. 2019). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley*, 15 N.E.3d at 1003. As opposed to the federal standard which permits the moving party to merely show the party carrying the burden of proof lacks evidence on a necessary element, Indiana law requires the moving party to "affirmatively negate an opponent's claim." *Id.* (quotation omitted). Our review is limited to the evidence designated to the trial court, T.R. 56(H), and we construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party, *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013). On appeal, the non-moving party carries the burden of persuading us the grant of summary judgment was erroneous. *Hughley*, 15 N.E.3d at 1003.

II. Negligence

[8] To prevail on the negligence claim, Plaintiff must establish: (1) Landlords owed a duty to Wamsley; (2) Landlords breached that duty by allowing their conduct to fall below the applicable standard of care; and (3) Landlord's breach of duty proximately caused a compensable injury to Wamsley. *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Absent a duty, there can be no breach. *Id.* And whether a duty exists is a question of law, which we review de novo. *Id.* at 386-87.

[9] The threshold inquiry in this case is whether Landlords owed a duty to their tenant, Wasmley, to protect her from sustaining a gunshot wound from the accidental discharge of another tenant's firearm in a neighboring unit into a shared wall. Under Indiana premises liability law, a landowner must exercise reasonable care for the invitee's protection while the invitee is on the premises. *Rogers v. Martin*, 63 N.E.3d 316, 320 (Ind. 2016). And although landowners owe invitees a duty to protect, courts must evaluate the critical element of foreseeability "before extending that duty to cases where an invitee's injury occurs not due to a dangerous condition of the land but due to some harmful activity on the premises." *Id.* at 324. Foreseeability in the context of duty is assessed differently than foreseeability in the context of proximate cause:

> Specifically, in the duty arena, foreseeability is a general threshold determination that involves an evaluation of (1) the broad type of plaintiff and (2) the broad type of harm. In other words, this foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected – without addressing the specific facts of the occurrence.

Id. at 325.

[10] A landowner has a duty to take reasonable precautions to protect his or her tenants from foreseeable criminal attacks. *Id.* at 326. Our supreme court has stated that "because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome is sufficiently likely is not enough to give rise to a duty." *Goodwin*, 62 N.E.3d at 392 (internal quotation omitted).

Instead, to determine whether an act is foreseeable in the context of duty, "we assess whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it." *Id.* (internal quotation omitted). If a landowner had reason to know of any imminent harm, that harm was, as a matter of law, foreseeable in the duty context. *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 841 (Ind. 2020). We will find a duty only if Landlords had contemporaneous knowledge of the situation at issue in this case. *Id.*

[11] Here, Plaintiff claims that the Crime Free Lease Addendum "specifically addressed the situation that caused the injuries in this case – the unlawful discharge of a firearm. Therefore, it was foreseeable to Landlords that this situation could occur, giving rise to duty." Appellant's Brief at 7-8. On the other hand, Landlords contend they "are not liable for negligence as a matter of law because they owed no foreseeable duty to protect . . . Wamsley from sustaining a gunshot wound through a wall shared with a neighboring tenant." Brief of Appellees at 7. We agree with Landlords.

[12] In applying the *Goodwin* foreseeability analysis, we find the broad type of plaintiff is a tenant in an apartment complex, and the broad type of harm is the probability or likelihood of sustaining a gunshot wound as a result of an accidental discharge of a firearm from a neighboring tenant into a common wall. Although many individuals may own a firearm, we do not believe that tenants routinely or accidentally shoot another tenant through a common wall. Therefore, it is not reasonably foreseeable for a landowner to expect this type of

harm to occur to one of its tenants. *See Rose v. Martin's Super Markets LLC*, 120 N.E.3d 234, 242 (Ind. Ct. App. 2019) ("[A]ll criminal activity is foreseeable to a certain degree, . . . [b]ut that does not mean that every [establishment] is required to provide protection . . . at all times[.]"), *trans. denied*; *Rogers*, 63 N.E.3d at 326 (holding that a homeowner has no duty to protect a guest/invitee from being injured by a co-host of party in unforeseeable fistfight).

[13] Plaintiff's insistence that we rely on the addendum, which contains a provision specifically prohibiting the unlawful discharge of a firearm, is misplaced and "improperly substitutes evidence of the . . . past . . . for contemporaneous knowledge of imminent harm." *Cavanaugh,* 140 N.E.3d at 844; *see also Rose*, 120 N.E.3d at 241 (in determining whether an active shooter situation in grocery store was foreseeable, stating that factoring evidence of a previous memo regarding active shooter protocol was "akin to evaluating the totality of the circumstances"). When analyzing foreseeability in the context of duty, employing a totality of the circumstances test is inappropriate. *Goodwin*, 62 N.E.3d at 389. Rather, a landlord's present knowledge "more conclusively elevates the knowledge of risk to 'some probability or likelihood of harm,' allowing courts to continue to find a duty when 'reasonable persons would recognize it and agree that it exists[.]'" *Cavanaugh*, 140 N.E.3d at 844 (citations omitted). Here, there is no evidence that Landlords had present knowledge that would lead them to reasonably believe that this situation was imminent such that they owed a duty to protect Wamsley. There are no genuine issues of

material fact and Landlords are entitled to judgment as a matter of law on this issue.

III. Nuisance

[14] Plaintiff also claims the trial court erred in granting summary judgment in favor of Landlords on the private and public nuisance claims. Specifically, Plaintiff contends Landlords' failure to repair the bullet hole in the dry wall, to ensure the elevator was working property, and to immediately terminate Joseph's tenancy "interfere[d] with [Wamsley's] use and enjoyment of the premises." Appellant's Br. at 12. We disagree.

[15] A nuisance is defined by statute. *Centennial Park, LLC v. Highland Park Estates, LLC,* 151 N.E.3d 1230, 1234 (Ind. Ct. App. 2020), *trans. denied*. Indiana Code section 32-30-6-6 provides, "Whatever is . . . injurious to health; indecent; offensive to the senses; or an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." A nuisance can be public or private. *Centennial Park*, 151 N.E.3d at 1234. A public nuisance is that which affects an entire neighborhood or community. *Hopper v. Colonial Motel Prop., Inc.*, 762 N.E.2d 181, 186 (Ind. Ct. App. 2002), *trans. denied*. A private nuisance affects only one individual or a determinate number of people and arises when one party has used his or her property to the detriment of the use and enjoyment of another's property. *Id.* A plaintiff cannot recover under a private nuisance theory for a personal injury, only for the inference with property rights. *Id.*

[16] Here, although Plaintiff frames the basis of its complaint as interference with a property right, the very essence of its claims is Wamsley's *personal injury* as a result of a gunshot wound. As Landlords assert, "Had Ms. Wamsley not been injured, Matthew Joseph's continued tenancy would not naturally produce physical discomfort to [her] or any persons of ordinary sensibility, tastes, and habits." Br. of Appellees at 21 (internal quotations omitted). We agree and therefore conclude that Plaintiff failed to establish a claim for private nuisance and Landlords are entitled to judgment as a matter of law on the issue.[2]

[17] Plaintiff also alleges Landlord's failure to maintain the apartment complex's elevator in a safe and working condition constitutes a public nuisance. Plaintiff contends that a "reasonable inference is that the elevator was for use by the public [and] a jury could find that [Wamsley] could have maintained a public nuisance claim as the lack of maintenance in a common area that would have deprived all tenants (and visitors) of the use and enjoyment of the premises." Appellant's Br. at 13-14.

[18] A public nuisance claim requires the plaintiff to demonstrate that the alleged nuisance was "reasonably and naturally calculated to injure the general public

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[2] With respect to Plaintiff's claim that Landlord's failure to repair the hole until May or October of 2016 constituted a nuisance, we note that Landlords cannot be liable for a nuisance "unless the injurious consequences complained of are the natural and proximate result of his acts, or his failure to perform some duty. It is the well-settled rule that a landlord cannot be held liable for a nuisance created upon the demised premises by the tenant during the tenancy, and without the consent of the landlord." *Neal v. Cure*, 937 N.E.2d 1227, 1231-32 (Ind. Ct. App. 2010) (citation omitted), *trans. denied*. Therefore, Landlords cannot be liable for the alleged nuisance, the bullet hole, that was by created by Joseph and without the consent of Landlords.

or strangers who may come upon the premises." *Sand Creek Partners, L.P. v. Finch*, 647 N.E.2d 1149, 1152 (Ind. Ct. App. 1995) (citation omitted). Because the apartment complex is a residential complex and not open to the public, the public did not have "free access" to the elevator. *See Place v. Sagamore Ctr., Inc.,* 604 N.E.2d 671, 675 (Ind. Ct. App. 1992) (holding that the appellant's suit for personal injuries could not be sustained under the "nuisance exception" to the doctrine of caveat leasee as the defective elevator at issue was not a private or public nuisance, in part, because the defendant did not have "free access" to the premises at the time and it was not open to the public at large), *trans. denied*. Therefore, it cannot be a public nuisance and the trial court properly granted summary judgment in favor of Landlords.

Conclusion

[19] There are no genuine issues of material fact and Landlords are entitled to judgment as a matter of law. Therefore, the trial court properly granted summary judgment in favor of Landlords. Accordingly, we affirm.

[20] Affirmed.

Bailey, J., and Tavitas, J., concur.