

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-002209-MR

JOSEPH TYRONE WASHINGTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 08-CI-012069

KIMART PROPERTIES, LLC

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Joseph Tyrone Washington appeals a decision of the Jefferson Circuit Court to dismiss his negligence action against appellee, KiMart Properties, LLC. Finding no error, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

The facts relevant to this appeal were correctly summarized by the circuit court as follows:

This case arises out of an incident in which Washington was shot and wounded at the premises of a rental residence located at 112 North 35<sup>th</sup> Street in Louisville, Kentucky. Defendant Sharon Renee Willis (“Willis”) was the signatory tenant of the property, where her two minor children also lived. Washington is the father of Willis’ two children. While he did not live with Willis and was not a tenant on the property’s lease, it is undisputed that he visited the property regularly.

Defendants Scott Overton (“Overton”) and Cleveland Williams (“Williams”) were acquaintances of Willis and also made regular visits to Willis’ residence. Neither Overton nor Williams were tenants at 112 North 35<sup>th</sup> Street. There is some dispute as to Washington’s relationship with Overton and Williams. However, it is apparent that the parties had met and interacted on several occasions. On December 18, 2007, Washington was involved in a physical altercation with Overton and Williams.

Defendant KiMart owns and rents properties, including the property located on North 35<sup>th</sup> Street. KiMart rented the residence to Willis beginning in July of 2007. Washington alleges he made two complaints to KiMart regarding Overton and Williams prior to the physical altercation on December 18, 2007. KiMart alleges no record or recollection of any phone calls received from Washington concerning Defendants Williams and Overton. However, Washington asserts that he informed KiMart that Overton and Williams were in the possession of firearms and drugs on the North 35<sup>th</sup> Street property. According to Washington, a KiMart agent assured him that the matter would be looked into.

On December 20, 2007, Washington was visiting Willis’ residence when Overton and Williams arrived at the residence. Washington was shot twice by Overton as he stood in the bedroom of the residence. Williams was also involved in the shooting.

Thereafter, Washington filed suit against Willis, Williams, Overton and KiMart. With regard to his claims against KiMart, Washington alleged

KiMart was negligent because it had failed to eliminate illegal activities that were taking place on the premises it had leased to Willis. Washington argued that, had KiMart done so, he would not have been injured. KiMart filed a motion for summary judgment, arguing that it owed Washington no such duty under the circumstances of this case. The circuit court agreed, granted KiMart's motion, and this appeal followed.

### **STANDARD OF REVIEW**

Summary judgment serves to terminate litigation where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. It should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment “is proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and

not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*.

## ANALYSIS

“To recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached its duty, and (3) the breach proximately caused the plaintiff's damages.” *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211–12 (Ky. App. 2007). Whether KiMart owed a duty to Washington is the primary focus of this appeal. As indicated, Washington asserts if KiMart had notice that Willis was allowing criminal activity to occur on the leased premises, KiMart's failure to abate the criminal activity rendered it liable to anyone injured as a result of the criminal activity. Washington also asserts that evidence of record demonstrates KiMart did have such notice, that this evidence created a genuine issue of material fact, and that it was accordingly inappropriate for the circuit court to summarily dismiss his claim of negligence against KiMart.

Even if some evidence of record demonstrated that Willis was allowing criminal activity on the premises, at least two rules of law undermine the proposition that KiMart could be held liable to third parties such as Washington for failing to prevent it.<sup>1</sup> First, a landlord is generally not liable for the negligent acts

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<sup>1</sup> From the state of his pleadings and brief, it is unclear whether Washington is also arguing that this duty stemmed from KiMart's lease agreement with Willis. To the extent that Washington is making this argument, however, the language of the agreement refutes it by clearly stating “Tenant is responsible for all occupants and guests.”

of his tenant. *Green v. Asher Coal Min. Co.*, 377 S.W.2d 68, 69 (Ky. 1964).

Second, a landlord is not a guarantor of the tenant's safety and is thus, by extension, not a guarantor of the safety of the tenant's guests. *See Davis v. Coleman Management Co.*, 765 S.W.2d 37 (Ky. App. 1989).

The authority Washington cites in support of holding KiMart liable for Willis' alleged negligence merely points out exceptions to these general rules that do not apply under the circumstances of this case. *Green*, for example, explains that a landlord could be liable for negligence and injuries to third persons involving leased premises, even if the landlord does not have actual control over the leased premises, if: (1) the nature of the injury is directly traceable to a potentially dangerous condition of the property which the lessor should anticipate and guard against; (2) the premises were leased for a purpose involving the admission of the general public; (3) the landlord expressly authorized the very conduct or condition that was the source of the injury; or (4) the injury resulted from the normal, expectable use by the tenant of the leased premises and appliances in the condition they were in at the time of the letting. *Id.* at 70.

Here, Washington's injuries resulted from the conduct of Willis' guests, not from any condition or use of the property. The premises were not leased as a public area, but as a private residence. No evidence demonstrates that KiMart expressly authorized any of the conduct that ultimately led to Washington being shot. And, even assuming Willis did allow illegally armed guests to

manufacture illegal substances on the leased premises, this would hardly qualify as a normal, expectable use by a tenant of the leased premises and appliances.

Washington also asserts that KiMart had a duty to prevent criminal activity from injuring him on the leased premises based upon the holding of *Waldon v. Housing Authority of Paducah*, 854 S.W.2d 777 (Ky. App. 1991). There, a criminal act of a third person caused the shooting death of a tenant in a public housing project. The Court held that the housing authority could be held liable for negligence because evidence supported that the criminal act in question was reasonably foreseeable and the housing authority failed to take reasonable steps to prevent it.

The most critical difference between *Waldon* and the case at bar, however, is that the housing authority's alleged negligence in *Waldon* originated from the fact that it had control over the premises. Specifically, the housing authority had the power to employ security guards to patrol the common areas in the housing project, and its liability-- for the purposes of the negligence action asserted against it in that matter-- hinged upon its responsibility for controlling the area where the tenant was ultimately shot and killed. *See id.* at 777 (noting that the decedent "was shot and killed outside her residence"); *id.* at 779-80 (explaining that the housing authority was aware that violent criminal activity frequently occurred in the complex, had previously employed security guards to patrol the complex, and that its failure to continue to do so, particularly in the area of the shooting, sufficiently demonstrated the housing authority had breached a legal

duty). Here, Washington was not shot in a common area subject to KiMart's control; rather, he was shot in a private residence subject to Willis' control.<sup>2</sup> In sum, *Waldon* has no application to these facts.

### CONCLUSION

Washington has failed to demonstrate that KiMart owed him any duty for the purpose of his negligence action. We therefore affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Arthur R. Samuel  
Sam Manly  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael E. Krauser  
Anthony T. Colyer  
Louisville, Kentucky

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<sup>2</sup> The lease agreement only gave KiMart a right to access the premises under limited circumstances and a right to evict Willis through court proceedings.