[Cite as *Pandey v. Banachowski* , 2011-Ohio-6830.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nirmala Pandey,	:	
Plaintiff-Appellant,	:	
		No. 11AP-459
v.	:	(C.P.C. No. 09CVC-10-14967)
Elizabeth Banachowski et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 30, 2011

Nirmala Pandey, pro se.

Smith, Rolfes & Skavdahl Company, LPA, M. Andrew Sway and *Matthew J. Dougherty,* for appellee Elizabeth Banachowski.

Matre & Beyke Co., LPA, Kerrie K. Matre and *Joseph L. Beyke,* for appellees Prudential Commercial Real Estate Columbus and Jim Simmons.

Freund, Freeze & Arnold, and *Carl A. Anthony,* for appellee Re/Max City Center Realtors.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, Nirmala Pandey, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment to defendants-appellees,

Elizabeth Banachowski, Re/Max City Center Realtors, Jim Simmons, and Prudential Commercial Real Estate Columbus, on plaintiff's claim that defendants negligently permitted a third party to enter plaintiff's property and set fire to it. Because the trial court did not err either in striking, in part, the exhibits plaintiff attached to her amended response to defendants' motions for summary judgment or in granting defendants' motions for summary judgment, we affirm.

I. Facts and Procedural History

{¶2} On October 6, 2009, plaintiff, the owner of real property located at 7336 East Main Street, Reynoldsburg, Ohio (the "property"), filed a complaint against defendants alleging that in May 2008, as a result of defendants' negligence, a vandal entered plaintiff's property through an unlocked door and set a fire that ultimately destroyed the building and caused in excess of $183,200 in damages.

{¶3} Plaintiff entered into an exclusive listing agreement in September 2006 with Prudential, acting through its licensed real estate agent Simmons, to sell the property. Banachowski, a licensed real estate agent employed with Re/Max, represented Richard Long, a prospective purchaser of the property.

{¶4} The property consisted of two residential units on the second floor of the building and a commercial area on the first floor. Although plaintiff was the titled owner of the property, Nawal Pandey, one of plaintiff's in-laws, dealt with the property on a daily basis and gave Simmons the key to the front door of the property so Simmons "could have shown the property to whoever was the perspective [sic] purchaser." (Nawal Pandey Depo., 101.)

{¶5} Simmons first went to the property in September 2006 when he put up signs and walked the property. In early May 2008, Long saw the realtor's sign on the property, called the phone number on the sign, and spoke with Simmons. Simmons and Long then met at the property on May 8, 2008, where Simmons showed Long the entire building. The two men entered through the front door, the only door to which Simmons had a key. Simmons further stated in his deposition that, because he ordinarily would do so, he would have opened all the doors in the rear of the building to show Long the exits. Simmons was certain he locked all of the doors when he left that day.

{¶6} After his meeting with Long, Simmons received a call from Banachowski. Banachowski informed Simmons she represented Long, and Long wanted to go back through the property with some contractors. Simmons told Banachowski she could pick up the key to the property at a store Khaled Abouseda owned, located on East Main Street. Simmons left the key with Khaled, an individual Simmons had known for many years, because Khaled was a contractor and had a potential client for the property. Nawal Pandey stated that, although he was not aware at the time that Simmons had given Khaled the key to the property, Nawal "came to know that Khaled was holding [the key] and [he] had no objection of [Simmons'] giving the key to Khaled." (Nawal Pandey Depo., 104.)

{¶7} Long and Banachowski testified in their depositions that Long, not Banachowski, contacted Simmons about viewing the property a second time. Long stated that, on his second visit to the property, he picked up the key from Khaled's store, and Banachowski, who is also Long's wife, accompanied Long to the property. Long used the key to enter the property through the front door and spent between 15 to 20 minutes in

the building determining what he "had to do to potentially upfit [sic] the building to make it rentable." (Long Depo., 15, 17.) Banachowski never entered the property, but sat in the car with the couple's child while Long inspected the building. Long testified that, other than the front door, he did not open any doors or windows, and he locked the front door when he left.

{¶8} Long and Banachowski never informed Simmons they were married. Banachowski admitted that, when she accompanied her husband to the property, she did not know whether she was there as his wife or his realtor. Had Long made an offer on the property, she would have written the offer.

{¶9} After learning that Long and Banachowski picked up the key from Khaled and had not yet returned it, Simmons contacted Banachowski on May 17, 2008 to inquire about the status of an offer and the whereabouts of the key. Banachowski confirmed the conversation happened and stated she informed Simmons both that Long was still looking at the property and that she would check on the status of the key.

{¶10} Long made his final visit to the property on May 19, 2008, the day of the fire. Long went to the property alone between 10:30 and 11:00 a.m. but never entered the building. Long parked his car at the back of the building, where he noticed the second floor back door was ajar and glass in the door was broken. Long walked around to the front of the building and saw "stab wounds in the * * * metal door, between the two buildings." (Long Depo., 24.) Long determined he did not want to purchase the building, as it had structural issues and he was "frightened because * * * obviously, somebody was in the building." (Long Depo., 26.) Long stated he left between 10:30 and 11:00 a.m. and returned the key to Khaled's store.

{¶11} The arsonist, a juvenile at the time of the offense but an adult at the time of his deposition, stated he entered the property between 11:30 a.m. and 12:00 p.m. on May 19, 2008. He lit fast food wrappers on fire; the flames spread and caused the building to burn. Although charged with aggravated arson, the arsonist ultimately was convicted of vandalism. Plaintiff did not have an insurance policy in place to cover the damage to the property.

{¶12} The arsonist initially went to the building two or three days prior to the fire with a neighborhood friend who before had been inside the building. On their initial visit, the boys entered through an unlocked door located between the two buildings on the second floor and exited through an unlocked second floor door at the rear of the building. On May 19, 2008, the arsonist entered and exited through the same doors as he had previously, both of which were unlocked. The arsonist never went in or out the front doors to the building.

{¶13} In December 2010, defendants filed Civ.R. 56 motions for summary judgment. Defendants alleged plaintiff's negligence claim failed for any one of three reasons: (1) plaintiff failed to establish that defendants owed plaintiff a duty to protect her property from the unforeseeable actions of a third-party arsonist, (2) plaintiff could not establish that defendants were the proximate cause of her harm where no evidence indicated Long or Simmons left the building unlocked, and (3) the arsonist's actions in setting fire to the building constituted an intervening cause of plaintiff's injury. Defendants supported their motions with citations to various depositions taken in discovery. Plaintiff filed a memorandum opposing defendants' motions for summary judgment on February 4, 2011, which, through leave of court, she amended on February 18, 2011.

{¶14} The trial court issued a decision granting defendants' motions for summary judgment on April 6, 2011. The court determined defendants were entitled to summary judgment because (1) defendants could not have foreseen that, as a result of allegedly leaving the door unlocked, a third party would enter the building and commit the crime of arson, (2) the arsonist's actions constituted an intervening or superseding cause of plaintiff's injury, and (3) plaintiff failed to produce evidence that defendants' conduct was the proximate cause of the fire. With that premise, the court concluded that, even construing the evidence in plaintiff's favor, no genuine issue of material fact existed for trial. The court issued a judgment entry on April 21, 2011 journalizing its April 6 decision.

II. Assignments of Error

{¶15} Plaintiff appeals, assigning the following errors:

> 1. THE TRIAL **COURT ERRED** WHEN IT GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DESPITE GENUINE ISSUES OF MATERIAL FACT.
>
> 2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT **SUMMARILY EXCLUDED** CERTAIN EXHIBITS.
>
> 3. THE TRIAL COURT'S ATTITUDE WAS UNREASONABLE, THEREFORE CONSTITUTED AN ABUSE OF DISCRETION AND PLAIN ERROR WHEN IT USED THE DOCTRINE OF INTERVENING AND SUPERSEDING **CAUSE WITHOUT** CONSIDERING THE PROXIMATE CAUSE.

For ease of discussion, we address plaintiff's assignments of error out of order, first discussing plaintiff's second assignment of error, and then plaintiff's first and third assignments of error together, as they are interrelated.

III. Second Assignment of Error – Plaintiff's Exhibits Properly Excluded

{¶16} Plaintiff's second assignment of error asserts the trial court erred in striking the exhibits plaintiff attached to her amended response to defendants' motions for summary judgment. In addition to the parties' depositions, plaintiff attached (1) her own affidavit, (2) Nawal Pandey's affidavit, (3) a statement from Jim Simmons, (4) portions of the National Association of Realtors Code of Ethics and Standards of Practice, (5) a list of "professional courtesies" published by the National Association of Realtors titled "Pathway to Professionalism," (6) a portion of the Ohio Canons of Ethics for the Real Estate Industry, and (7) the first two pages of the police report concerning the fire. Re/Max, Prudential, and Simmons filed motions to strike the affidavits and exhibits attached to plaintiff's amended response.

{¶17} The trial court granted in part and denied in part defendants' motions to strike. The court declined to strike the affidavits in full simply because the affidavits lacked the words " 'personal knowledge,' at least when the statements [in the affidavits] indicate that the affiant is claiming to have personal knowledge." (Decision, 2.) The court noted that it was "capable of determining which statements in the affidavits are proper and which are not." (Decision, 2.) Concerning the remaining documents, the court concluded the documents had "not been properly authenticated under Civ.R. 56(C) and so need not be considered." (Decision, 2.) The court, citing *Cramer v. Bucher*, 3d Dist. No. 5-02-01, 2002-Ohio-3397, ¶14, citing *Stump v. Ploutz* (Mar. 4, 1983), 4th Dist. No. 1119, also observed that "canons of ethics for realtors [are] irrelevant when establishing liability for negligence." (Decision, 2.)

{¶18} According to Civ.R 56(C), summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," reveal no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. When a party to summary judgment proceedings wishes to present the court with a document not of the type listed in Civ.R. 56(C) " 'it may be introduced as proper evidentiary material if incorporated by reference in a properly framed affidavit.' " *Hart v. Columbus Dispatch/Dispatch Printing Co.*, 10th Dist. No. 02AP-506, 2002-Ohio-6963, ¶18, quoting *Buzzard v. Pub. Emp. Retirement Sys. of Ohio* (2000), 139 Ohio App.3d 632, 636.

{¶19} The court did not err in striking the codes and canons of ethics, the partial police report, or Simmons' unsworn and uncertified statement. Such documents are not among the types listed in Civ.R. 56(C), and plaintiff did not incorporate the documents by reference in a properly framed affidavit. See *State ex rel. Shumway v. Ohio State Teachers Retirement Bd.* (1996), 114 Ohio App.3d 280, 287, quoting *Mitchell v. Ross* (1984), 14 Ohio App.3d 75 (stating " '[d]ocuments which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court' "). Similarly, to the extent the trial court struck portions of the Pandeys' affidavits which were not based on personal knowledge, the court did not err. Civ.R. 56(E) (stating supporting affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit").

{¶20} Accordingly, plaintiff's second assignment of error is overruled.

IV. First and Third Assignments of Error - Summary Judgment Properly Granted

{¶21} Plaintiff's first assignment of error asserts the trial court erred in granting defendants' motions for summary judgment because defendants had a duty "to conduct themselves according to certain standards so as to avoid unreasonable risks to her." (Appellant's brief, 6-7.) Plaintiff's third assignment of error contends the trial court erred in granting defendants' motions for summary judgment, because genuine issues of material fact exist concerning whether defendants' actions were the proximate cause of the fire and whether the arsonist's actions were an intervening cause of the fire.

{¶22} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.,* 78 Ohio St.3d 181, 1997-Ohio-221.

{¶23} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in

Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. Id.*; Vahila v. Hall,* 77 Ohio St.3d 421, 1997-Ohio-259. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

{¶24} Plaintiff alleged that Simmons and Banachowski, acting on behalf of their respective employers, negligently conducted themselves as real estate agents in allowing Long to possess the key for ten days and to view the property without a real estate agent present. To establish a cause of action for negligence, plaintiff was required to present evidence of (1) the existence of a duty, (2) a breach of that duty, and (3) an injury resulting proximately from the breach. *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, citing *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125; *Feldman v. Howard* (1967), 10 Ohio St.2d 189. In the negligence context, a trial court properly grants a motion for summary judgment "[w]hen the defendants, as the moving parties, furnish evidence which demonstrates the plaintiff has not established the elements necessary to maintain [her] negligence action." *Feichtner v. Cleveland* (1994), 95 Ohio App.3d 388, 394, citing *Keister v. Park Centre Lanes* (1981), 3 Ohio App.3d 19.

A. *Duty*

{¶25} " 'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.' " *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶23, quoting *Commerce & Industry Ins. Co. v. Toledo* (1989),

45 Ohio St.3d 96, 98. The existence of a duty depends on the foreseeability of harm, so that "if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." Id. (Citations omitted.) Common law, legislative enactment, or the particular circumstances of a given case may establish the duty element of negligence. Id.

{¶26} Responding to defendants' motions for summary judgment, plaintiff alleged Simmons and Banachowski, as realtors, not only "owed a special duty to plaintiff by virtue of being agent and sub-agent" but were "duty bound to adhere to the Realtors' Code of Ethics." (Plaintiff's Amended Response, 4.) The canons and codes of ethics for realtors, however, were improper evidentiary material under Civ.R. 56 and properly stricken in the trial court. Even if plaintiff had properly submitted the codes and canons of ethics by reference in a properly framed affidavit, such documents in themselves do not establish a realtor's liability for negligence. *Cramer* at ¶14 (affirming trial court's decision that found the National Association of Realtors' Code of Ethics and Standards of Practice did " 'not constitute a standard of actionable conduct in Ohio as to the performance or non-performance by a realtor under a given set of circumstances' "); *Stump* (affirming trial court's ruling that Canons of Ethics were "irrelevant to establishing liability for negligence" because "a violation of the Canons of Ethics does not, by law, make one negligent, and vice versa").

{¶27} Real estate agents nonetheless owe a fiduciary duty to their clients. *Parahoo v. Mancini* (Apr. 14, 1998), 10th Dist. No. 97APE08-1071, appeal not allowed, 83 Ohio St.3d 1416; *Moreland v. Ksiazek*, 8th Dist. No. 83509, 2004-Ohio-2974, ¶20. See *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio

St.3d 274, 282 (noting "[a] 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust"). "Like other professionals, a person holding a real estate license is held to a higher standard of competency and fairness than is a lay member of the public in the market-place." *Richard T. Kiko Agency, Inc. v. Ohio Dept. of Commerce, Div. of Real Estate* (1990), 48 Ohio St.3d 74, 76. To that end, the General Assembly invested the Ohio Real Estate Commission with the authority to adopt canons of ethics and sanction licensed realtors who violate such canons. See *Boggs v. Ohio Real Estate Comm.*, 186 Ohio App.3d 96, 2009-Ohio-6325, ¶31-33 (internal citations omitted).

{¶28} "Except to the extent the duties of a real estate agent are specifically set forth in" Chapter 4735 of the Revised Code "or are otherwise modified by agreement, the duties of a real estate agent are determined by the common law." R.C. 4735.52. As relevant here, R.C. 4735.62 requires that a real estate agent, in representing a client, "use the licensee's best efforts to further the interest of the client including, but not limited to, * * * [e]xercising reasonable skill and care in representing the client and carrying out the responsibilities of the agency relationship." R.C. 4735.62(A). A real estate agent must abide by common law fiduciary duties, including disclosure, good faith, and loyalty. *State Farm Fire & Cas. Co. v. Century 21 Arrow Realty*, 8th Dist. No. 87081, 2006-Ohio-3967, ¶33, quoting *Horning v. Fletcher*, 7th Dist. No. 05 MA 7, 2005-Ohio-7078, quoting *Whaley v. Zyndorf/Serchuk, Inc.*, 6th Dist. No. L 01 1295, 2002-Ohio-2640, ¶8; R.C. 4735.75(B).

{¶29} Although Simmons, as plaintiff's real estate agent, owed plaintiff a fiduciary duty, including the duty to exercise reasonable skill and care in representing plaintiff, Banachowski would have owed the fiduciary duty to her client, Long. *Parahoo*; R.C. 4735.62(A). The listing agreement between Simmons and plaintiff states that the "Owner authorizes Broker and all salespersons authorized by listing Broker to have access to the property at all reasonable times for the purpose of showing it." (Nawal Pandey Depo., Exhibit 2.) Nawal Pandey, who dealt with the property daily on plaintiff's behalf, testified he had "no objection" to Simmons' allowing Khaled to possess the key. (Nawal Pandey Depo., 103-04.)

{¶30} Although plaintiff framed Simmons' and Banachowski's duties as respective duties to safeguard the key and accompany a prospective purchaser onto the property, the substance of plaintiff's negligence claim is that defendants had a duty to ensure that the doors were locked so as to prevent the arsonist from entering the building and setting it on fire. The trial court determined defendants could not have foreseen the series of events which would unfold after the door allegedly was left unlocked, as "defendants could not have foreseen that a third party would commit the crime of arson, when there is no evidence of previous incidents of arson in that building or the surrounding area." (Decision, 10.)

{¶31} "If a person exercises control over real * * * property and such person is aware that the property is subject to repeated third-party vandalism * * *, then a special duty may arise, to those parties whose injuries are reasonably foreseeable, to take adequate measures under the circumstances to prevent future vandalism." *Federal Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, syllabus

(determining defendant had a special duty to provide adequate measures to protect the plaintiff, defendant's neighboring property owner, from harm where defendant was aware of specific acts of vandalism occurring on its construction site). Absent such circumstances, "no common-law duty to anticipate or foresee criminal activity" exists. Id. at 174, citing Prosser & Keeton, Law of Torts (5 ed.1979) 201-203, Section 33. Because criminal acts are largely unpredictable, the totality of the circumstances which render a criminal act foreseeable "must be 'somewhat overwhelming' in order to create a duty." *Shivers v. Univ. of Cincinnati*, 10th Dist. No. 06AP-209, 2006-Ohio-5518, ¶7, quoting *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 194.

{¶32} Although defendants may have had control over the property as a result of possessing the key, plaintiff failed to present evidence establishing that the fire was reasonably foreseeable. Nawal Pandey testified that his truck, while parked near the property, was broken into six months prior to the incident, but both plaintiff and Nawal Pandey testified they were not aware of any acts of vandalism or arson occurring to real property in the area. To the contrary, plaintiff testified the "[n]eighborhood was very quiet. It was peaceful" and not a high crime area. (Nirmala Pandey Depo., 32.) Simmons similarly testified that, aside from the fire, he was not aware of any incidents where people came into the building unlawfully. Because the arsonist's actions of entering the property unlawfully and setting it on fire were unforeseeable, defendants did not owe plaintiff a duty to protect her from such harm. Cf. *Farley v. Duke Constr. Co.*, 10th Dist. No. 08AP-192, 2008-Ohio-6419, ¶36, appeal not allowed, 121 Ohio St.3d 1453, 2009-Ohio-1820 (concluding plaintiffs could not establish the defendant had a duty to prevent third parties from entering its construction site, as plaintiffs failed to demonstrate defendant

had anything "above the level of a generalized awareness that trespassing is common at any construction site"); *Kelly v. Bear Creek Investment Co.* (Feb. 14, 1991), 8th Dist. No. 58011.

B. *Proximate Cause*

{¶33} In response to defendants' motions for summary judgment, plaintiff argued that "[d]espite the fact that Mr. Long says he did not open the doors and Mr. Simmons says he locked the doors; the doors were left open" and "reasonable minds would come to only one conclusion that Defendants failed to lock the doors that facilitated the act of arson." (Plaintiff's Amended Response, 4.) The trial court found proximate cause lacking, pointed out Long testified he did not leave a door unlocked, and noted the arsonist's "testimony that the door was unlocked when he entered the building, even if true, does not constitute evidence that Long or another defendant was the person who left the door unlocked." (Decision, 11.)

{¶34} To establish proximate cause, plaintiff must prove her injuries were the natural and probable consequence of defendants' negligent act. *Zachariah v. Roby*, 178 Ohio App.3d 471, 2008-Ohio-4832, ¶44, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 287. To find that an injury was the natural and probable consequence of an act, it must appear that the defendant could have foreseen or reasonably anticipated the injury resulting from the alleged negligent act. *Strother* at 287. An injury is foreseeable if a reasonably prudent person, under the same or similar circumstances, would have anticipated that injury to another was the likely result of his conduct. *Commerce & Industry Ins. Co.* at 98, citing *Menifee* at 77.

{¶35} Here, plaintiff did not sue Long whom she alleges left a door unlocked, or the arsonist who admitted to starting the fire. Rather, plaintiff sued the real estate agents involved in the sale of her property. Plaintiff failed to present evidence establishing that a natural and probable consequence of defendants' alleged negligence in failing to safeguard the key or accompany a prospective purchaser onto the property was an arsonist setting fire to the building. Further, both Simmons and Long testified they did not leave a door to the premises unlocked, and plaintiff presented no evidence to the contrary.

{¶36} In her response to defendants' motions for summary judgment, plaintiff asserted, citing to alleged inconsistencies in Long's testimony, that Long was untruthful and that "his deposition appear[ed] to be a trumped-up story." (R. 153, 10-13.) "The credibility of witnesses should * * * be resolved at trial, and not on summary judgment." *Hassan v. Progressive Ins. Co.* (2001), 142 Ohio App.3d 671, 676; *Pearce v. Fouad*, 146 Ohio App.3d 496, 2001-Ohio-3986, ¶26, appeal not allowed, 100 Ohio St.3d 1431, 2003-Ohio-5396 (noting "uncontroverted testimony may be disbelieved where the witness has an interest in the litigation, the witness's story is improbable, or there are contradictions in the witness's testimony").

{¶37} Even if plaintiff raised a credibility concern about the truthfulness of Long's testimony and thus created an issue for trial in that respect, plaintiff also failed to present evidence establishing that "had the buildings' doors been properly locked the arson would not have occurred." *Runge v. Rosewater* (June 14, 1984), 8th Dist. No. 47650, citing *Gugten v. Rhodes* (1940), 162 Ohio App. 163 (determining plaintiffs failed to establish that their landlord's failure to install adequate locks on apartment building doors was the

proximate cause of the fire, where no evidence proved "that the arsonist entered the building through the unlocked door and that he would not have entered and set fire to the building if the door had been securely locked"). Although the arsonist testified he entered the building through an unlocked door, he also testified that on the day he started the fire the windows at the front of the building were open. The arsonist further stated his friend may have broken some of the windows on the boys' first visit to the property. Simmons testified a set of bay windows on the second floor of the property, which were accessible with the use of a ladder, "were sometimes vented open," and Long stated one of the doors was open at the back of the building. (Simmons Depo., 73-74.)

{¶38} Thus, even if defendants locked the doors, someone may have entered the building either through an open window or by breaking a window and exited, leaving the door unlocked. Moreover, as the Pandeys both testified to no prior acts of arson or vandalism in the area surrounding the property, nothing indicated a foreseeable consequence of leaving the doors unlocked was an arsonist's entering the building and setting fire to it. Accordingly, plaintiff failed to establish that defendants' actions were the proximate cause of her harm.

C. *Intervening or Superseding Cause*

{¶39} Plaintiff alleged, in response to defendants' motions for summary judgment, that although the arsonist "may have been the intervening cause, * * * the negligent act of the Defendants to leave the doors open was sufficient to facilitate the arson, the intervening cause." (Plaintiff's Amended Response, 19.) The trial court decided that the arsonist was a " 'conscious and responsible agency' which undertook actions which were 'an efficient, independent, and self-producing cause of the injury.' " (Decision, 11.)

{¶40} " '[W]here the original negligence of the defendant is followed by the independent act of a third person" that injures the plaintiff, "defendant's earlier negligence may be found to be a proximate cause of those injurious consequences, if, according to human experience and in the natural and ordinary course of events, defendant could reasonably have foreseen that the intervening act was likely to happen.' " *Federal Steel & Wire Corp.* at 175, quoting *Taylor v. Webster* (1967), 12 Ohio St.2d 53. The test used to determine the foreseeability of an intervening cause "is 'whether the original and successive acts may be joined together as a whole, linking each of the actors as to the liability, or whether there is a *new* and *independent* act or cause which intervenes and thereby absolves the original negligent actor.' " (Emphasis sic.) *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.* (1995), 73 Ohio St.3d 609, 619-20, quoting *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155, 160.

{¶41} "[T]he law usually does not require the prudent person to expect the criminal activity of others." *Federal Steel & Wire Corp.* at 174. Even so, "a defendant, who is in control of certain premises, may be liable for injuries to others notwithstanding the intervening criminal acts of some parties, where the defendant knows that there has been a history of repeated tampering or vandalism of the same or similar nature occurring on such premises." Id. at 177.

{¶42} Even if a question of fact exists as to whether defendants' negligence permitted a door to remain unlocked, thus allowing the arsonist to enter the building easily, the arsonist's further action of setting the building on fire was not foreseeable to defendants where plaintiff did not present evidence of other acts of vandalism or arson occurring in the surrounding area. Cf. *Pendrey v. Barnes* (1985), 18 Ohio St.3d 27, 28

(concluding that where the operator of a motor vehicle negligently left his vehicle unattended with the key in the ignition and the door unlocked, the operator was not liable to a third person injured after a thief stole the vehicle because, although "the theft may have been anticipatable, the subsequent negligent use of the vehicle to injure a third party was not"); *Hubbell v. Ross* (Nov. 9, 1999), 10th Dist. No. 99AP-294 (determining that, even if the defendants negligently allowed a pothole to exist on their premises, the actions of plaintiff and his friends "intervened to break any causal connection * * * and [were] too remote and far removed from any breach that [defendants] may have committed"). Accordingly, even if defendants breached a duty to plaintiff, the arsonist's subsequent unforeseeable criminal act intervened and broke the chain of causation.

{¶43} Accordingly, plaintiff's first and third assignments of error are overruled.

V. Disposition

{¶44} Having overruled plaintiff's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas granting in part and denying in part defendants' motions to strike and granting defendants' motions for summary judgment.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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