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LITTLE HOUSE OF HORRORS: MAY A CONDOMINIUM ASSOCIATION BE HELD LIABLE FOR FAILURE TO PROVIDE ADEQUATE SECURITY OR MAINTENANCE IN THE COMMON AREAS?

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I. INTRODUCTION

The use of the condominium form of ownership has grown at a rapid pace.[1] Since 1961, when Congress authorized the Federal Housing Administration to insure mortgages on condominium dwellings,[2] the lawmaking bodies of every state and the District of Columbia have passed enabling legislation that provides for the creation of a condominium regime with a statutory base.[3] The con-

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1. The term "condominium" has been defined as "[a] single real property parcel with all the unit owners having a right in common to use the common elements with separate ownership confined to the individual units which are serially designated." BLACK'S LAW DICTIONARY 267 (5th ed. 1979). This property concept originated with the passage in Puerto Rico of the Horizontal Property Act, No. 104, 1958 P.R. Laws 243 (Current version at P. R. LAWS ANN. tit. 31, §§ 1291-1293k (1958)). Once passed, builders and developers who found it difficult to obtain financing for their ventures brought pressure on Congress to amend the National Housing Act, ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1982)). Spoonamoore, *Condominiums in Washington*, 46 WASH. L. REV. 147, 149 (1970). These efforts resulted in an amendment to the National Housing Act, which authorized the Federal Housing Administration to insure mortgages on condominium dwellings. National Housing Act of 1961, Pub. L. No. 87-70, § 104, 75 Stat. 149, 160 (codified as amended at 12 U.S.C. § 1715y (1982)). The FHA then prepared a model condominium statute which spurred the enactment of enabling legislation in 31 states during 1963. Since then, condominium development "has spread rapidly throughout the United States." Note, *Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321 (1970).

2. As originally enacted, the measure applied only to family units in a multifamily structure covered by a project mortgage insured under some other section of the Act. A 1964 amendment provided for the insurance of project mortgages directly in the same section of the Act. National Housing Act of 1964, Pub. L. No. 88-560, § 119, 78 Stat. 769, 780-82 (codified as amended at 12 U.S.C. § 1715y (1982)).

3. 1 [PART 3] P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 10A.01 (1987); *see* Note, *supra* note 1, at 321.

dominium is a unique form of property ownership,[4] which now constitutes a significant percentage of all new housing starts. Although the development of the condominium has many positive aspects,[5] the unique structure of a typical condominium regime has presented the legal community with some perplexing problems,[6] one of which concerns the tort liability of the condominium association for injuries occurring in the common areas.[7]

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4. As a form of property ownership, title to a condominium combines the ownership of two estates into one: a unit owner owns, in fee simple, a single unit in a multi-unit structure while simultaneously maintaining an undivided interest in the common elements as a tenant in common with the other unit owners. Note, *supra* note 1, at 322; Casenote, *Condominium Law—Allocations of Tort Liability—Unit Owner's Liability for Tort Claims Arising from Common Elements Due to Negligence of Owner's Association Limited to Proportionate Ownership in Common Elements*, 15 ST. MARY'S L.J. 663, 664 (1983). In addition to the combined ownership of the two estates enumerated above, the major characteristics of a condominium include an agreement among the unit owners regulating the administration and maintenance of the property. Thus, the condominium has been characterized as a "welding of two distinct tenures, one in severalty and the other in common." Kerr, *Condominium-Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 27 (1963).

One type of condominium regime consists of an apartment house within which the individual units are located and in which the common areas consist of the grounds and any remaining buildings. Unit owners are responsible for maintaining their own apartments, while the condominium association maintains the common areas. 15A AM. JUR. 2D *Condominiums & Cooperative Apartments*, § 1 (1976).

5. The continued growth of population, coupled with urban sprawl, has led to a need for increased efficiency in the use of land. Condominiums have been touted as the solution. Spoonamore, *supra* note 1, at 147. Condominiums have been "heralded as a means of restoring the amenities of city living, as well as the ideal format for suburban property owner associations." 1 [Part 3] P. ROHAN & M. RESKIN, *supra* note 3, § 10A.01. As such, the condominium concept has been useful in combating neighborhood decline while meeting population pressures with high-rise, multi-purpose buildings. *Id.* Additionally, it has been argued that the condominium is a promising method for lower-income individuals to attain the status of home ownership. Spoonamoore, *supra* note 1, at 148. "By owning his own apartment rather than paying rent, the unit owner also eliminates that portion of his housing cost which would be the landlord's profit." *Id.*

6. *See generally* Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915 (1976); Annotation, *Personal Liability of Owner of Condominium Unit to One Sustaining Personal Injuries or Property Damage by Condition of Common Areas*, 39 A.L.R.4TH 98 (1985); Annotation, *Construction of Contractual or State Regulatory Provisions Respecting Formation, Composition and Powers of Governing Body of Condominium Association*, 13 A.L.R.4TH 598 (1982); Annotation, *Zoning or Building Regulations as Applied to Condominiums*, 71 A.L.R.3D 866 (1973); Annotation, *Liability of Vendor of Condominiums for Damage Occasioned by Defective Condition Thereof*, 50 A.L.R.3D 1071 (1973); Annotation, *Liability of Condominium Association or Corporation for Injury Allegedly Caused by Condition of Premises*, 45 A.L.R.3D 1171 (1972).

7. Common areas are generally the areas available for use by all unit owners. For a general list as to what is included in the common areas by most statutes, see 15A AM. JUR. 2D, *supra* note 4 § 32. Under Virginia law, common areas are defined as "all portions of the condominium other than the units." VA. CODE ANN. § 55-79.41(a) (Repl. Vol. 1986).

The purpose of this article is to describe the potential tort liability of a condominium association to unit owners and third parties arising from a lack of security or failure to maintain the common areas of the condominium.

Because the Virginia Condominium Act[8] is silent as to such liability and the Supreme Court of Virginia has not decided the issue of a condominium association's duty of care, analogous common law principles will be reviewed to determine the association's duty to unit owners and third parties. Accordingly, this article will examine the common law theories of liability established by precedent, both in Virginia and other jurisdictions, applicable to (i) possessors of land and (ii) landlords. This article will also examine the procedural issues arising from the unique structure of many condominium associations. Finally, this article will examine the common law defenses to a tort action, such as contributory negligence and assumption of risk, and more specifically those defenses unique to the condominium association such as the defenses of waiver and estoppel.

II. Theories of Tort Liability

There are no reported Virginia cases concerning the tort liability of a condominium association. Nevertheless, from the provisions of the Virginia Condominium Act,[9] as well as analogous case law in other jurisdictions,[10] this article attempts to predict the outcome of litigation in this area.

A. *Comparison of Theories of Tort Liability in Virginia and Other Jurisdictions*

Condominium associations have been sued in tort for a variety of reasons in many jurisdictions. Most cases are based on negligence principles, and examples include personal injury actions for slip and fall injuries arising from the negligent maintenance of a water sprinkler,[11] the failure to remove snow from the common

8. Va. Code Ann. §§ 55-79.39 to -79.103 (Repl. Vol. 1986). The Virginia Condominium Act applies to all condominiums and horizontal property regimes.

9. Va Code Ann. §§ 55-79.39 to -79.103 (Repl. Vol. 1986); *see infra* notes 51-52 and accompanying text.

10. *See infra* notes 38-44, 74-86 and accompanying text.

11. White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971) (unit owner sustained injuries falling over water sprinkler negligently maintained by condominium association in common area of condominium project); *see infra* notes 102-08 and accompanying text.

areas,[12] allowing a lobby floor to remain wet,[13] and wrongful death actions for unsafe conditions in the common areas.[14] There have also been actions for property damage arising from the condominium association's failure to make repairs.[15] Plaintiffs have also pursued negligence actions for the criminal acts of third parties based upon: 1) misrepresentations made to a prospective unit owner concerning the security measures to be maintained by the association;[16] or 2) the theory that the condominium association failed to make the premises safe[17] or to provide adequate lighting.[18]

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12. Schoondyke v. Heil, Heil, Smart & Golee, Inc., 89 Ill. App. 3d 640, 411 N.E.2d 1168 (1980) (summary judgment reversed where nonowner occupier of condominium unit sued condominium association and corporation to recover damages for injuries sustained in fall on snow-covered portion of the common area because defendant voluntarily assumed duty of snow removal in its bylaws).

13. Packer v. Winston Towers One Hundred Ass'n, 377 So. 2d 46 (Fla. Dist. Ct. App. 1979) (directed verdict for defendant reversed where elderly plaintiff slipped and fell on wet spot in lobby of condominium building).

14. *See, e.g.*, Walters v. Greenglade Villas Homeowners Ass'n, 399 So. 2d 538 (Fla. Dist. Ct. App. 1981) (summary judgment for defendant affirmed in an action against association following drowning of child in nearby canal); Hemispheres Condominium Ass'n v. Corbin, 357 So. 2d 1074 (Fla. Dist. Ct. App. 1978) (verdict for plaintiff reversed in action in which person renting from owner-member of association drowned in swimming pool provided by the association); Pratt v. Maryland Farms Condominium Phase 1, Inc., 42 Md. App. 632, 402 A.2d 105 (1979) (verdict for plaintiff reinstated in an action against owner of complex for injuries received by child who lived with his parents in the complex and who climbed tree on premises and came in contact with uninsulated electric wire).

15. *See, e.g.*, Kleinman v. High Point of Hartsdale I Condominium, 108 Misc. 2d 581, 438 N.Y.S.2d 47 (N.Y. Sup. Ct. 1979) (motion to dismiss granted as to members of board of managers where unit owners sued condominium and its board of managers seeking damages to property for failure to make adequate repairs); Dutcher v. Owens, 647 S.W.2d 948 (Tex. 1983) (tenants in unit sued the association and the unit owner to recover for property loss sustained in fire which began in external light fixture in common area; the court held that unit owner's liability was limited to his pro rata interest in the regime as a whole); Schwarzmann v. Association of Apartment Owners of Bridgehaven, 33 Wash. App. 397, 655 P.2d 1177 (1982) (owners of individual unit sued condominium board of directors claiming damages to property for failure to remedy water problem).

16. *See, e.g.*, Olar v. Schroit, 155 Cal. App. 3d 861, 202 Cal. Rptr. 457 (1984) (tenant's allegation that landlord and association had committed fraud which resulted in a sexual assault upon her was sufficient to state a cause of action).

17. *See, e.g.*, Admiral's Port Condominium Ass'n v. Feldman, 426 So. 2d 1054 (Fla. Dist. Ct. App. 1983) (in an action in which condominium unit owners filed suit to recover damages sustained when one of them was attacked in the parking lot of the complex, the court reversed verdict for plaintiffs because they failed to provide evidence that defendant breached its duty of care); King v. Ilikai Properties, Inc., 2 Haw. App. 359, 632 P.2d 657 (1981) (lessee of condominium unit in hotel and her guest were assaulted and robbed by unidentified persons in unit; the court held that the defendants owed no duty to protect plaintiffs from criminal acts of third parties).

18. *See, e.g*, Troy v. Village Green Condominium Project, 149 Cal. App. 3d 135, 196 Cal. Rptr. 680 (1983) (unit owner's action against association and individual directors to recover damages for injuries sustained in criminal assault allegedly resulting from failure to provide

There is no common theme running through these cases. Although condominiums are creatures of statute, there is no statutory duty that gives rise to the tort liability of a condominium association. A contractual obligation may arise, however, where the responsibility for maintenance and security in the common areas has been assumed by the condominium association in its bylaws or similar documents. The presence of such a contractual obligation, while not dispositive of the issue, is certainly evidence of a duty.[19] Such a duty, however, may be limited to unit owners or their family members, tenants, guests or other invitees. Thus far, the courts have rarely analyzed the cases based upon contractual duties.[20] Instead, courts have resorted to the various common law duties established by precedent for possessors of land[21] and landlords.[22] Where the plaintiff is a unit owner and a member of the condominium association, the courts have had to struggle with the additional issue of the ability of an association member to sue the association.[23]

1. Liability of a Possessor of Land

As a general rule, a person in possession of land must act in a manner reasonably likely to avoid harm to others.[24] Although such a person may be held strictly liable,[25] the great majority of cases, especially those involving personal injuries, define the duty of care in terms of negligence principles.[26] As a result, the traditional com-

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adequate exterior lighting in vicinity of unit; court held that unit owner's complaint was sufficient to state cause of action).

19. *See generally* 57 AM. JUR. 2D *Negligence* § 47 (1971).

20. *See Schoondyke*, 89 Ill. App. 3d 640, 411 N.E.2d 1168.

21. *See Admiral's Port Condominium Ass'n*, 426 So. 2d 1054; *Pratt*, 42 Md. App. 632, 402 A.2d 105.

22. *See Olar*, 155 Cal. App. 3d 861, 202 Cal. Rptr. 457; *Troy*, 149 Cal. App. 3d 135, 196 Cal. Rptr. 680; *King*, 2 Haw. App. 359, 632 P.2d 657.

23. *See infra* notes 94-122 and accompanying text.

24. This rule has developed "for the obvious reason that the person in possession of property ordinarily is in the best position to discover and control its dangers." W. PROSSER & W. KEETON, THE LAW OF TORTS § 57 (5th ed. 1984). *See generally* 62 AM. JUR. 2D *Premises Liability* § 12 (1972) ("control" is an attribute that must be shown as a basis for the owner's liability).

25. "A possessor of land is subject to strict liability for harm resulting from an abnormally dangerous activity that he carries on upon the land, to persons coming upon the land in the exercise of a privilege, whether derived from his consent or otherwise." RESTATEMENT (SECOND) OF TORTS § 520C (1977); *see, e.g.*, Rylands v. Fletcher, L.R. 3E & I. App. 330 (1868).

26. W. PROSSER & W. KEETON, *supra* note 24, § 57, at 387.

mon law approach has been to measure the nature of the duty of a possessor of land according to the status of the entrant at the time of the injury.[27] Entrants have been classified as licensees, invitees and trespassers, and each category delineates the standard of care which is owed to the entrant.[28] The traditional common law rule is that the only duty the possessor of land owes a licensee[29] is not to harm him willfully or wantonly.[30] An invitee,[31] on the other hand, is in a more favored position than a licensee.[32] Consequently, the traditional common law rule states that the possessor of land is under an affirmative duty to use ordinary care to maintain his premises in a reasonably safe condition.[33] With respect to a trespasser,[34] almost no duty of care is owed to ensure his safety from defective premises.[35]

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27. 62 AM. JUR. 2D *Premises Liability* § 37 (1972). *Cf.* Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee or Trespasser*, 22 A.L.R. 4TH 294, 301 (1983) (A number of jurisdictions, such as Alaska, California, Colorado, Hawaii, Louisiana, New Hampshire, New York and Rhode Island, have totally rejected the common law's determination of liability based on the entrant's status and have adopted the rule that the owner of land has a duty of reasonable care under all circumstances.).

28. 62 AM. JUR. 2D, *supra* note 27, § 58 (1972).

29. A licensee is "[a] person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor." BLACK'S LAW DICTIONARY, *supra* note 1, at 830. *See generally* W. PROSSER & W. KEETON, *supra* note 24, § 60.

30. McMullan v. Butler, 346 So. 2d 950 (Ala. 1977) (owner of premises owed his social guest, as a licensee, a duty not to willfully or wantonly injure him, or not to negligently injure him after discovering he was in peril); Hilker v. Knox, 18 N.C. App. 628, 197 S.E.2d 618 (1973) (invited guest in home is a licensee to whom owner owes duty to refrain from willful or wanton negligence); *see also* 62 AM. JUR. 2D, *supra* note 27, § 74 (1972).

31. "A person is an 'invitee' on land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner." BLACK'S LAW DICTIONARY, *supra* note 1, at 742. *See generally* W. PROSSER & W. KEETON, *supra* note 24, § 61, at 419.

32. This is so because the invitee enters upon the premises at the invitation of the owner. 62 AM. JUR. 2D, *supra* note 27, § 62.

33. *Id. See also* W. PROSSER & W. KEETON, *supra* note 24, § 61, at 419.

34. A trespasser is "[o]ne who intentionally and without consent or privilege enters another's property." BLACK'S LAW DICTIONARY, *supra* note 1, at 1348. *See generally* W. PROSSER & W. KEETON, *supra* note 24, § 58.

35. The trespasser is lowest on the legal scale, because the trespasser has entered without the landowner's consent. W. PROSSER & W. KEETON, *supra* note 24, § 58 at 393. Nevertheless, a landowner cannot willfully or wantonly injure the trespasser. 62 AM. JUR. 2D, *supra* note 27, § 87. Also, if the trespasser is in danger and if the landowner learns of the trespasser's presence, the duty becomes one of reasonable care. Schofield v. Merrill, 386 Mass. 244, ___, 435 N.E.2d 339, 344 (1982) (quoting Pridgen v. Boston Hous. Auth., 364 Mass. 696, 707, 308 N.E.2d 467, 474 (1974)).

As a general rule, a possessor of land has no duty to protect another person from criminal acts committed by third persons on his land.[36] This, of course, assumes the absence of an express agreement or prior incidents which may give the possessor of land reason to anticipate future violence.[37]

The duty of care owed by a possessor of land to invitees has been applied in the condominium context. In *Pratt v. Maryland Farms Condominium Phase 1, Inc.*,[38] an action was brought against the owner of a condominium complex for injuries received by a child who lived with his parents in the project. While climbing a tree in the complex, the child came in contact with an uninsulated electrical wire.[39] Since both parties stipulated that the child was an invitee, the court of appeals applied the Maryland law of liability applicable to a possessor of land as to invitees. The court concluded that the owner of the condominium knew or should have known that the position of the tree in relation to the wires created an unreasonable risk of harm and therefore the owner should have exercised reasonable care to make the premises safe. The court also noted that these same standards applied to common areas set aside by a landlord for the use of his tenants.[40]

In *Admiral's Port Condominium Association v. Feldman*,[41] an action was brought by two condominium unit owners, as husband and wife, to recover damages sustained when the wife was mugged in the project's parking lot.[42] Although judgment was entered for the defendant association,[43] the court noted that "the duty of care

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36. 62 AM. JUR. 2D, *supra* note 27, § 26.

37. *See* Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977) (no liability where store owner could not reasonably foresee criminal attack); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (owners of shopping center and businesses therein not liable for criminal act of third party because not foreseeable); *cf.* Manzanares v. Playhouse Corp., 25 Wash. App. 905, 611 P.2d 797 (1980) (jury question as to whether tavern keeper was negligent because possibility of violence was reasonably foreseeable).

38. 42 Md. App. 632, 402 A.2d 105 (1979).

39. *Id.* at ___, 402 A.2d at 106. Apparently, the developer had not turned over control of the unit owners association to the association at the time the action arose; therefore, suit was instituted against the developer/owner. Suit was also brought against Potomac Electric Power Company but the plaintiff settled with the power company before trial and signed a joint tortfeasor's release. *Id.* at ___, 402 A.2d at 107-08.

40. *Id.* For additional discussion of the standards applicable to these common areas, see Macke Laundry Serv. Co. v. Weber, 267 Md. 426, 429, 298 A.2d 27, 30 (1972), and the cases cited therein.

41. 426 So. 2d 1054 (Fla. Dist. Ct. App. 1983).

42. *Id.*

43. *Id.* at 1055. Judgment was entered for the association because there was no evidence

owed by a landowner to an invitee with respect to protection from criminal acts of a third person is dependent upon the foreseeability of that third party's activity."[44]

Virginia has adhered to the rule that a landowner is under no duty to keep his premises in a safe and suitable condition for the use of a licensee.[45] Consequently, the possessor is liable only for willful or wanton conduct that causes injury to the licensee.[46] Yet, if a licensee is injured by the affirmative negligence of the possessor of land, the test in Virginia is one of reasonable care under the circumstances.[47] With respect to an invitee, the landowner must use ordinary care and prudence to render the premises reasonably safe for the visit.[48] Concerning trespassers, landowners owe a duty to abstain only from intentionally injuring them.[49]

Virginia could follow other jurisdictions[50] in extending the duties of landowners to condominium associations where the associations are charged with control of the common areas.[51] Although the Virginia Condominium Act intimates that such "responsibility" can be contracted away pursuant to the provisions of the specific condominium's bylaws,[52] where the bylaws confer the same powers

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to suggest that it had been put on notice to take reasonable steps to guard against crimes against persons in its parking lots.

44. *Id.* at 1054. The court held, however, that "[e]vidence of similar crimes committed off the premises and against persons other than the landowner's invitees is not probative of foreseeability." *Id.* at 1055.

45. Busch v. Gaglio, 207 Va. 343, 150 S.E.2d 110 (1966); Bradshaw v. Minter, 206 Va. 450, 143 S.E.2d 827 (1965).

46. *Busch*, 207 Va. at 346, 150 S.E.2d at 113-14.

47. *Id.* Where the injury involves the activities of the host, and *not* the condition of the premises, the host owes a duty to exercise reasonable care to avoid injury to the guest. *Bradshaw*, 206 Va. at 453, 143 S.E.2d at 829; *see also* Limberg v. Lent, 206 Va. 425, 143 S.E.2d 872 (1965) (guest can recover if host failed to exercise reasonable care to avoid injury).

48. Tate v. Rice, 227 Va. 341, 348, 315 S.E.2d 385, 388 (1984); *see also* Vandergrift v. United States, 500 F. Supp. 229 (E.D. Va. 1978), *aff'd*, 634 F.2d 628 (4th Cir. 1980).

49. Appalachian Power Co. v. LaForce, 214 Va. 438, 201 S.E.2d 768 (1974).

50. *See supra* notes 38-44 and accompanying text.

51. Under the Virginia Condominium Act, the condominium association has responsibility for the maintenance, repair, renovation, restoration and replacement of the common areas, unless the condominium instruments provide otherwise. VA. CODE ANN. § 55-79.79(a)(1) (Repl. Vol. 1986).

52. *Id.* § 55-79.79(a). The statute reads as follows: "*Except to the extent otherwise provided by the condominium instruments*, all powers and responsibilities . . . with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong . . . to the unit owners' association in the case of the common elements . . . ." *Id.* (emphasis added). This language is quite clear in its meaning. "Condominium instruments" is a "collective term referring to the declaration, bylaws, and plats and plans, recorded pur-

and responsibilities upon the association that the statute does, a statutory duty would obviously exist. This argument is more compelling in view of the fact that the Supreme Court of Virginia has already applied a landowner's duty of care in the landlord/tenant context.[53]

2. Landlord Liability

As a general rule, a landlord has a duty to exercise reasonable care to maintain the common areas in a reasonably safe condition.[54] This duty also extends to members of the tenants' families, their guests and invitees.[55] Landlords must refrain only from willfully or wantonly injuring licensees and trespassers.[56]

In Virginia, a landlord owes a duty to use ordinary care to maintain common areas in a reasonably safe condition so as to avoid injuries to tenants and others lawfully on the premises.[57] Traditionally, this duty requires the landlord to keep the common areas in good repair and free of latent defects, but does not require him to police the areas.[58] The landlord owes this duty to both tenants and other individuals lawfully on the premises.[59]

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suant to the provisions" of the Act. *Id.* § 55-79.41(e). Accordingly, the intent of the legislature was to allow the association to *alter* these duties by redesignating them in the bylaws or declaration. *Id.*

53. *See* Colonial Natural Gas Co. v. Sayers, 222 Va. 781, 284 S.E.2d 599 (1981) (footpaths in apartment complex were common areas which tenants were impliedly invited to use; therefore, plaintiff was invitee and court properly instructed jury as to duties owed by defendant landowner to an invitee).

54. 49 AM. JUR. 2D *Landlord & Tenant* § 805 (1970); *see also* 52 C.J.S. *Landlord & Tenant* § 417(a) (1968); Casenote, *Condominiums—Member of Unincorporated Association of Condominium Owners Permitted to Bring Personal Injury Action Against Association for the Negligent Maintenance of Common Areas*, 40 FORDHAM L. REV. 627, 628-30 (1972); Annotation, *Landlord's Liability for Injury or Death Due to Defects in Outside Walks, Drives, or Grounds Used in Common by Tenants*, 68 A.L.R.3D 382 (1976). *See generally* Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982); Goetz, *Wherefore the Landlord—Tenant Law "Revolution"—Some Comments*, 69 CORNELL L. REV. 592 (1984); Rabin, *The Revolution in Residential Landlord—Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 529-30 (1984).

55. 49 AM. JUR. 2D, *supra* note 54, § 810. Thus, if the landlord would have been liable to the tenant, the liability would also extend to the tenant's wife, child or family members, or to persons expressly or impliedly invited by the tenant. *Id.* § 811.

56. *Id.* § 812. There are two qualifications to this rule: (1) a landlord is liable for his affirmative or active negligence; and (2) a landlord is liable for latent defects of which he had knowledge and failed to communicate to the licensee. 52 C.J.S., *supra* note 54, § 418(8).

57. *E.g.*, Gulf Reston, Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974); Taylor v. Virginia Constr. Corp., 209 Va. 76, 161 S.E.2d 732 (1968).

58. *Gulf Reston*, 215 Va. at 157, 207 S.E.2d at 844.

59. Williamson v. Wellman, 156 Va. 417, 158 S.E. 777 (1931).

It is generally recognized that the mere relationship of landlord and tenant does not impose upon the landlord a duty to protect tenants and their invitees from the criminal activities of third persons.[60] Nevertheless, over the past two decades, the legislatures and the courts in a majority of jurisdictions have expanded the duty owed by landlords to tenants, often holding the landlord liable for the criminal acts of third parties committed against tenants, their property and their invitees.[61] Three separate theories of liability form the basis of these decisions: contract, tort and warranty of habitability which includes security measures for the protection of tenants.[62]

Most modern courts have discarded the notion of a lease as a conveyance and have acknowledged that the relationship between landlord and tenant is contractual.[63] From this contractual relationship, the courts have found express warranties that the premises are safe in lease instruments, rental advertisements and statements made by the landlord or his agent.[64] In addition, implied warranties have been found to arise from the security conditions that existed on the premises at the time the lease was executed.[65]

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60. Ten Assocs. v. McCutchen, 398 So. 2d 860, 861 (Fla. Dist. Ct. App. 1981); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980); Bass v. New York, 61 Misc. 2d 465, ___, 305 N.Y.S.2d 801, 806 (N.Y. Sup. Ct. 1969), *rev'd on other grounds*, 38 A.D.2d 407, 330 N.Y.S.2d 569 (1972), *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973). *See generally* Note, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431 (1985); Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3D 331 (1972).

61. *E.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (drastic reduction in security measures in effect at beginning of lease gave rise to tenant's cause of action for injuries sustained in an assault and robbery in common hallway of apartment house); Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981) (landlord had a duty to exercise reasonable care to protect tenants against foreseeable criminal acts of third persons); Phillips v. Chicago Hous. Auth., 89 Ill. 2d 122, 431 N.E.2d 1038 (1982) (allegation that landlord voluntarily undertook security measures but performed them negligently was sufficient to state a cause of action).

62. Milich, *Protecting Commercial Landlords from Liability for Criminal Acts of Third Parties*, 15 REAL EST. L.J. 236, 238 (1987).

63. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The concept of a lease as a conveyance is inapplicable to present day landlord-tenant law because the typical urban apartment lease is "a well known package of goods and services," which includes "secure windows and doors." *Id.* at 1074; *see also Kline*, 439 F.2d 477 (court recognized lease to be a contract which implied a landlord's obligation to provide to his tenants "those protective measures that are within his reasonable capacity").

64. *E.g.*, Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (D. Kan. 1980).

65. *See, e.g., id.* at 1160.

In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[66] the landlord was held liable for injuries sustained by the tenant when she was assaulted in a common hallway of the apartment building. The tenant established that the landlord allowed the security measures within the building to fall below the standard that existed when the lease was made. The court implied from the lease a duty to provide reasonable safety to the tenant and held the landlord liable for failure to meet that standard.[67]

Other courts have relied on statutory enactments governing housing. In *Javins v. First National Realty Corp.*,[68] for example, the court held that the lease had created an implied warranty of habitability. The court relied on housing code requirements to establish the landlord's duty of care to the tenant, and held the landlord liable for the tenant's injury "attributable to that breach."[69]

Although many jurisdictions have adopted statutory warranties of habitability, few have applied such warranties to the issue of building security. Most courts use a tort theory to find a landlord responsible for criminal attacks on tenants and their invitees. Under this reasoning, the landlord's failure to provide security measures in the first instance, or failure to maintain security devices, can be deemed the proximate cause of the tenant's injury from a criminal act.[70] Courts following this reasoning, and at least one treatise,[71] have consistently rejected the defense that the intervening act of a third party, the criminal, negates the landlord's negligence.[72] Instead, courts have held that if the criminal activity was foreseeable, the landlord can be held liable.[73] Depending on the jurisdiction, the definition of foreseeability may have different

66. 439 F.2d 477.

67. *Kline* embraced both a contractual (implied warranty) and a tort theory of liability and illustrates a growing trend among courts to find landlord liability for nonfeasance with regard to foreseeable criminal activity.

68. 428 F.2d 1071.

69. *Id.* at 1080; *see also Trentacost*, 82 N.J. 214, 412 A.2d 436. The New Jersey Supreme Court held a warranty of habitability implied in the lease could independently serve as the basis for a finding of landlord liability for criminal acts by third parties. In so holding, *Trentacost* effectively discarded foreseeability as a limitation on landlord liability. In effect, the court's recognition of an implied warranty of habitability as a basis for liability meant the landlord would be absolutely liable for any contractual breach.

70. Milich, *supra* note 63, at 240.

71. RESTATEMENT (SECOND) OF TORTS § 302B (1977).

72. *See infra* notes 75-88 and accompanying text.

73. "Foreseeability of the criminal activity is a decisive factor in determining causation, as it is in determining duty." Graham v. M & J Corp., 424 A.2d 103 (D.C. 1980). Several

meanings. In *Holley v. Mt. Zion Terrace Apartments, Inc.*,[74] the court imposed a standard of care on a landlord who had personal knowledge of security problems and of the potential for crime in the building. The defendant landlord was held liable for the murder of a tenant in her apartment when he failed to secure a common walkway that provided the murderer's only access to the tenant's apartment.[75]

Jurisdictions that have decided the question of a landlord's duty of care to tenants and third parties have tended to adopt a parallel tort theory in the condominium context. In *Frances T. v. Village Green Owners Association*,[76] a condominium unit owner brought suit against the association and its individual directors to recover damages for injuries sustained in a criminal assault allegedly resulting from the failure to provide adequate exterior lighting.[77] One of the fundamental issues raised in this case was whether the homeowners' association and its individual directors occupied the same position as a landlord in the traditional landlord-tenant relationship.[78] In deciding that for all practical purposes the defendants were functioning as the project's "landlords,"[79] the court concluded that traditional tort principles imposed upon them "a duty to exercise due care for the residents' safety in those areas under their control."[80] The court approved the intermediate appellate court's reasoning that "since only the landlord is in a position to secure common areas, he has a duty to protect against types of crimes of which he has notice and which are likely to recur if the

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courts have looked to the RESTATEMENT (SECOND) OF TORTS for guidance in ascertaining the landlord's liability:

> The act of a third person in committing an intentional tort or crime is a superceding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS § 448 (1977); *see* Spar v. Obwoya, 369 A.2d 173 (D.C. 1977) (citing the RESTATEMENT and holding landlord liable for a tenant's injuries for a failure to secure a front door lock); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) (citing the RESTATEMENT and holding landlord liable for creating conditions conducive to criminal assaults).

74. 382 So. 2d 98 (Fla. Dist. Ct. App. 1980).

75. *Id.* at 100-01 (summary judgment for defendant landlord reversed).

76. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

77. *Id.* at ___, 723 P.2d at 576-80, 229 Cal. Rptr. at 459-63.

78. *Id.*

79. *Id.* at ___, 723 P.2d at 576-77, 229 Cal. Rptr. at 460.

80. *Id.*

common areas are not secure,"[81] and that his duty was to exercise reasonable care.[82]

Similarly, in the case of *Olar v. Schroit*,[83] a tenant sued the unit owner and homeowners' association of a condominium complex alleging fraud and negligence resulting in a sexual assault upon her.[84] The court stated that since the association could be considered a "de facto landlord," a fiduciary relationship existed between the association and individual condominium unit owners. The court noted that there was no distinction between a landlord of a multiple dwelling building and the homeowners' association because the homeowners' association was the only party in control of the security of the parking facilities and surrounding access areas.[85] Accordingly, the court held that the association was under an affirmative obligation to employ reasonable measures to safeguard its tenants against foreseeable risks in those areas.[86]

Although *Francis T.* and *Olar* held in favor of the plaintiff, the courts did so in part because the criminal acts complained of were reasonably foreseeable.[87] Thus, where negligence is alleged, resolution of the association's liability in any given case will invariably depend on whether or not the criminal activities complained of by the plaintiff were foreseeable.

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81. 149 Cal. App. 3d 135, 196 Cal. Rptr. 680, 684 (1983), *vacated*, 229 Cal. Rptr. 456 (1986).

82. *Id.* at ___, 196 Cal. Rptr. 684.

83. 155 Cal. App. 3d 861, 202 Cal. Rptr. 457 (1984).

84. *Id.*

85. *Id.* at ___, 202 Cal. Rptr. at 466.

86. *Id.*; *see also* Frances T. v. Village Green Owners Ass'n, 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986) (the association is the project's "landlord" and has a duty to exercise due care for the residents' safety in those areas under its control).

87. *Olar*, 155 Cal. App. 3d at ___, 202 Cal. Rptr. at 463 n.11; *Troy*, 149 Cal. App. 3d at ___, 196 Cal. Rptr. at 684. In King v. Ilikai Properties, Inc., 2 Haw. App. 359, ___, 632 P.2d 657, 661 (1981), however, the court held that the owner of the condominium unit and the homeowners association were not liable for injuries sustained by a tenant and her guest from an assault and robbery by three unidentified persons in the unit. The court adopted the Restatement view:

> There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless
> (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct,
> (b) a special relationship exists between the actor and the other which gives to the other a right to protection.

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)). The court noted, however, that special circumstances might impose a duty of care, such as when a landlord drastically reduces security measures that were in effect at the beginning of the tenancy.

Thus far, Virginia has not followed the trend in other jurisdictions on this issue where a landlord's failure to provide adequate security measures has resulted in liability.[88] Recently, the United States Court of Appeals for the Fourth Circuit, applying Virginia law, reaffirmed the traditional standard of limited liability for a landlord. In *Deem v. Charles E. Smith Management, Inc.*,[89] the court relied on *Gulf Reston, Inc. v. Rogers*,[90] and determined that the landlord-tenant relationship imposed no special duty on a landlord to protect a tenant from an intentional criminal attack committed by an unknown third person. Deem had been sexually assaulted in the parking lot of the apartment complex where she resided. She sued the landlord alleging that her injuries resulted from the landlord's failure to light the parking lot adequately. The Fourth Circuit rejected Deem's contention that "safe conditions" or "safety" as those terms are used in the Virginia Residential Landlord and Tenant Act,[91] meant that the landlord had to protect tenants from criminal attacks. Instead, the court found that those terms refer to the protection of the tenant from injuries caused by physical defects in the premises.

Since the duties of a landlord have been applied to the condominium context in other jurisdictions,[92] a similar application could be made in Virginia. For all practical purposes, a condominium association is a "de facto" landlord[93] where it is responsible for maintenance and security of the common areas. Consequently, the same duties and liabilities which attach to landlords could also attach to condominium associations.

B. *Procedural Aspects Related to Unincorporated Associations*

At common law, unincorporated associations[94] were not amenable to suit by their members or by third parties because they were

88. *See supra* notes 57-59 and accompanying text. *See generally* Comment, *Landlord Liability for Crimes Committed by Third Parties Against Tenants*, 21 U. RICH. L. REV. 181 (1986).

89. 799 F.2d 944 (4th Cir. 1986).

90. 215 Va. 155, 207 S.E.2d 841.

91. *See* VA. CODE ANN. § 55-248.13 (Repl. Vol. 1986).

92. *See supra* notes 76-86 and accompanying text.

93. *See Olar*, 155 Cal. App. 3d at ___, 202 Cal. Rptr. at 465.

94. An unincorporated association is a "[v]oluntary group of persons, without a charter, formed by mutual consent for purpose of promoting common enterprise or prosecuting common objective." BLACK'S LAW DICTIONARY, *supra* note 1, at 1373; *see also* Yonce v. Miners Memorial Hosp. Ass'n, 161 F. Supp. 178, 186 (W.D. Va. 1958).

not regarded as separate legal entities.[95] As a result, aggrieved parties were forced to sue the individual members of the association to seek redress.[96] Since members of an unincorporated association were believed to be engaged in a joint enterprise, the negligence of each member in the prosecution of the enterprise was imputed to the other members.[97] Although the majority rule is that injured members may not recover from the association,[98] there is authority supporting a trend toward recognition of the association and its members as separate legal entities.[99]

With respect to the tort liability of an association, the general rule is that an unincorporated association is under the same duties and liabilities as any other group of individuals.[100] Consequently, condominium associations may be held liable for failure to use ordinary care in the maintenance of common areas controlled by the association.[101]

White v. Cox[102] was the first case to compare a condominium association to an unincorporated association with respect to the ability of an association member to sue the association.[103] The case

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95. Spoonamoore, *supra* note 1, at 170-71. *See*, Casenote, *supra* note 54, at 630; Case Comment, *Condominiums—Tort Liability- Member of Owner's Association Allowed to Bring Personal Injury Suit Against Association for Injuries Incurred in Common Area of Condominium Project*, 2 MEM. ST. U.L. REV. 169, 169 (1971-72). *But see* VA. CODE ANN. § 8.01-15 (Repl. Vol. 1984) (unincorporated associations may sue or be sued under the name by which they are commonly called). *See generally* 2A MICHIES JUR. *Associations and Clubs* § 6 (Repl. Vol. 1980).

96. This is still the prevailing view where there is no statute or rule of practice to the contrary. 6 AM. JUR. 2D *Associations and Clubs* §§ 43, 51 (1963); *see also* 2A MICHIES JUR., *supra* note 95, § 6.

97. "This doctrine is based on the notion that an unincorporated association lacks any legal existence independent of its members. Additionally, the imputed negligence theory assumes that each member exercises control over the operation of the association." Comment, *supra* note 88, at 169.

98. *See* Case Note, *supra* note 54, at 631 (where the author notes that although the common law rule has been repudiated by the Federal Rules of Civil Procedure and by a number of state legislatures, these statutes do not give the association members the right to sue the association).

99. *See* Case Note, *supra* note 4, at 664. This is a surprising conclusion considering that the note cites only California, Massachusetts and Ohio cases to support the proposition.

100. 6 AM. JUR. 2D, *supra* note 96, § 47.

101. *See id.* For a discussion concerning the tort liability of an association as to licensees and invitees, as well as to unit owners, see Note, *supra* note 1, at 339-41.

102. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971). For an in-depth discussion of this case, see Casenote, *supra* note 54, at 627, 633-35. Hyatt & Rhoads, *supra* note 6, at 945-46; *see also* Case Comment, *supra* note 95, at 169. *White* did not decide the requisite duty of care the association owes unit owners and invitees. Its holding was limited to the issue of standing to sue.

103. *See* Case Note, *supra* note 54, at 633. This case has also been described as "semi-

involved a suit by a condominium unit owner against the association for injuries sustained due to the alleged negligence of the association in the maintenance of the common areas.[104] The sole issue addressed by the court was whether a member of an unincorporated association could bring an action against the association for damages which resulted from the failure to exercise due care in the maintenance of the common areas of the condominium project.[105] While answering this question in the affirmative, the court examined the issues of separateness[106] and control[107] and concluded that "a condominium possesses sufficient aspects of an unincorporated association to make it liable in tort to its members" and both the condominium and the condominium association may be sued in the condominium's name.[108]

Courts that have followed *White v. Cox*, allowing individual condominium unit owners to maintain an action against the association, have also permitted suits against individual members of the association's board of directors. Generally, the officers and directors of a corporation are exempt from liability where their actions fall within the parameters of the "business judgment rule."[109] Like

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nal." W. S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 294 (1981).

104. Plaintiff, White, owned a condominium in the Merrywood condominium project and was a member of Merrywood Apartments, a nonprofit, unincorporated association which maintained the common areas. White alleged that he tripped and fell over a water sprinkler negligently maintained by Merrywood Apartments in the common areas. 17 Cal. App. 3d at ___, 95 Cal. Rptr. at 259.

105. *Id.*

106. The court noted that "the concept of separateness in the condominium project carries over to any management body or association formed to handle the common affairs of the project, and that both the condominium project and the condominium association must be considered separate legal entities from its unit owners and association members." *Id.* at ___, 95 Cal. Rptr. at 262.

107. The court looked to the statutory scheme of the condominium project and observed that "in ordinary course a unit owner does not directly control the activities of the management body set up to handle the common affairs of the condominium project." As a result, the court said that it "would be sacrificing reality to theoretical formalism" to rule that the plaintiff had any effective control over the operation of the common areas. *Id.* at ___, 95 Cal. Rtpr. at 262-63.

108. *Id.* at ___, 95 Cal. Rptr. at 263. The court's conclusion would seem to be a logical one, given that "denying [individual condominium owners] the right to sue would leave them remediless for torts occurring in common areas or committed by association employees." Comment, *Property: Twentieth Annual Survey of Developments in Virginia Law, 1974-1975*, 61 VA. L. REV. 1834, 1846 (1975).

109. For an excellent statement of the business judgment rule, see 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1039 (rev. perm. ed. 1986):

> It is too well settled to admit of controversy that ordinarily neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment,

their corporate counterparts, the officers and directors of a condominium have a fiduciary responsibility to exercise ordinary care in performing their duties and are required to act reasonably and in good faith.[110] Whether such board members can be held liable for specific torts has generally depended upon the directors' involvement in the wrongful or negligent conduct.

In *Schwarzmann v. Association of Apartment Owners of Bridgehaven*,[111] suit was brought against individual members of a condominium's board of directors for failure to repair a water leak. While the court found no evidence of bad faith or improper motive which would demonstrate that the board members breached a duty owed to plaintiffs, it left the door open for holding individual directors personally liable. The court noted that if the board members acted in bad faith or knowingly participated in or condoned wrongful or negligent conduct, they would not be protected by the business judgment rule.[112]

In *Frances T. v. Village Green Owners Association*,[113] the court stated that directors could be held personally liable under either of two theories. Under the first theory, the court required evidence that the directors specifically authorized, directed or participated in the tortious conduct.[114] Under the second theory, the court required evidence that the directors knew, or reasonably should have known, that some hazardous condition or activity under their control could injure the plaintiff, and that they negligently failed to take appropriate action to avoid the harm.[115] Although the court

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> either of law or fact. In other words, directors of a commercial corporation may take chances, the same kind of chances that a person would take in his or her own business. Because they are given this wide latitude, the law will not hold directors liable for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistakes. And that is true even though the errors may be so gross that they may demonstrate the unfitness of the directors to manage the corporate affairs. . . .

110. The principles of the "business judgment rule" have been applied to governing bodies of condominiums. *See, e.g.*, Rywalt v. Writer Corp., 34 Colo. App. 334, 526 P.2d 316 (1974); Papalexiou v. Tower West Condominium, 167 N.J. Super. 516, 401 A.2d 280 (1979); *see also* Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 663-66 (1981). In Virginia, the "business judgment rule" is codified for corporate directors. VA. CODE ANN. § 13.1-690 (Repl. Vol. 1985).

111. 33 Wash. App. 397, 655 P.2d 1177 (1982).

112. *Id.* at ___, 655 P.2d at 1181.

113. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

114. *Id.* at ___, 723 P.2d at 583-84, 229 Cal. Rptr. at 466-67.

115. *Id.* at ___, 723 P.2d at 584, 229 Cal. Rptr. at 467.

noted the existence of the "business judgment rule," it stated that the rule does not abrogate the common law duty which every person owes to another—to refrain from conduct which imposes an unreasonable risk of injury on third parties.[116] The court held that the plaintiff alleged facts sufficient to state a cause of action under either theory.[117]

Although Virginia statutory law provides that unincorporated associations "may sue and be sued under the name by which they are commonly known and called, or under which they do business,"[118] the ability of a member to sue an unincorporated association is a question which has yet to be resolved under Virginia law.[119] Fortunately, the Virginia General Assembly had the wisdom to foresee this problem when drafting the Virginia Condominium Act, for the Act clearly confers upon an owner of a condominium unit the ability to sue the condominium association.[120] The General Assembly seems to have recognized that condominium associations are structurally unique. Unlike the members of most other unincorporated bodies (such as partnerships), individual condominium owners have no direct control over the daily operations of the association. This would also be the case where the condominium association is a non-stock corporation.[121] Denying condominium owners the right to sue would leave them without a remedy for torts occurring in the common areas or committed by association employees. Suits cannot be brought against individual unit owners, and any judgments against the association constitute liens only against property owned by the association, not against the property of individual unit owners. Individual owners are liable for such judgments only in proportion to their liability for common expenses.[122]

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116. *Id.* at ___, 723 P.2d at 583, 229 Cal. Rptr. at 465-66.

117. *Id.* at ___, 723 P.2d at 586, 229 Cal. Rptr. at 469.

118. VA. CODE ANN. § 8.01-15 (Repl. Vol. 1984).

119. Unfortunately, the statute is silent on this point. To that extent, it might be implied that a member cannot sue the association on the theory that common law rules prevail unless *expressly* abrogated by statute.

120. "No unit owner shall be precluded from bringing such an action by virtue of his ownership of an undivided interest in the common elements or by reason of his membership in the association or his status as an officer." VA. CODE ANN. § 55-79.80:1(a) (Repl. Vol. 1986).

121. Although section 55-79.80:1(a) of the Virginia Act does not distinguish between unincorporated associations and incorporated associations, it is not inconsistent with the Virginia Non-Stock Corporation Act which provides that a non-stock corporation may be sued in its corporate name. *See id.* § 13.1-826(A)(1) (Repl. Vol. 1985).

122. *Id.* § 55-79.83(c); *see also* 1 [Part 3] P. ROHAN & M. RESKIN, *supra* note 3, § 10A.04[2].

III. Applicable Defenses

The defenses available in Virginia to condominium associations in cases such as these are the same as in other tort cases. Thus, if the plaintiff in a negligence action has been contributorily negligent, he cannot recover.[123] Similarly, one who voluntarily exposes himself to a hazard created by another assumes the risk of injury and thereby relieves others of legal responsibility for such injury.[124] Most suits against condominium associations are based on negligence principles.[125] Assuming that the defenses applicable to possessors of land[126] and landlords[127] are applicable to condominium associations, it is clear that if suit is permitted against a condominium association in Virginia, "traditional tort principles such as nondelegable duties of a landowner, assumption of risk, contributory negligence and related defenses may bar recovery."[128] Indeed, such principles have been applied in condominium litigation in other jurisdictions.[129]

In addition to the typical defenses that may be available, a condominium association may have other defenses available solely because of the unique relationship between the condominium association and the member. For example, a condominium association may be able to assert the defenses of waiver or estoppel against a member of the association. The defense could arise where, for example, a condominium association decided, for budgetary reasons, to exclude security services from the operating budget. If the member (and subsequent plaintiff) agreed to that decision, it could then be argued that he had waived his cause of action against the asso-

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123. Smith v. Virginia Elec. & Power Co., 204 Va. 128, 129 S.E.2d 655 (1963); Yeary v. Holbrook, 171 Va. 266, 198 S.E. 441 (1938).

124. VanCollom v. Johnson, 228 Va. 103, 319 S.E.2d 745 (1984).

125. *See supra* notes 11-18 and accompanying text.

126. A landowner is not required to warn of open and obvious conditions. Vandergrift v. United States, 500 F. Supp. 229 (E.D. Va. 1978), *aff'd*, 634 F.2d 628 (4th Cir. 1980); Charles v. Commonwealth Motors, 195 Va. 576, 795 S.E.2d 594 (1954).

127. Landlords may be relieved of liability by the contributory negligence of the tenant. *See, e.g.*, Ward v. Clark, 163 Va. 770, 177 S.E. 212 (1934); Berlin v. Wall, 122 Va. 425, 95 S.E. 394 (1918).

128. 1 [Part 3] P. Rohan & M. Reskin, *supra* note 3, § 10A.04[2].

129. *See, e.g.*, Murphy v. D'Youville Condominium Ass'n, 175 Ga. App. 156, 333 S.E.2d 1 (1985) (no duty to warn of danger if it is apparent and known to the plaintiff); Schoondyke v. Heil, Heil, Smart & Golee, Inc., 89 Ill. App. 3d 640, 411 N.E.2d 1168 (1980) (defendant not entitled to summary judgment on issue of contributory negligence because it is ordinarily a question of fact for the jury).

ciation for failure to provide security services. Likewise, it could be argued that the member was estopped to sue the association for lack of security.

IV. Conclusion

The tort liability of the condominium association with respect to unit owners and third parties has not yet been decided in Virginia. Although the well-established rule in Virginia is that violation of a statutory duty constitutes negligence per se,[130] the Virginia Condominium Act does not appear to create a statutory standard of care for condominium associations. The Act does provide that all powers and responsibilities with regard to the common elements, such as maintenance, repairs, renovation, restoration and replacement, belong to the unit owners' association.[131] Yet the very same provision intimates that such "responsibility" can be contracted away pursuant to the provisions of the specific condominium association's bylaws.[132] Should it appear, however, that the bylaws confer the same powers and responsibilities upon the association that the statute does, then the existence of a statutory duty would be obvious. Consequently, any practitioner must consult the bylaws of the condominium in question before assuming that a duty of care exists.[133]

Should a duty of care exist, a standard of ordinary care in the maintenance of the common areas may be imposed on the condominium association if the association is viewed as analogous to a possessor of land or a landlord. The tort theory is then the most efficient ground upon which to determine liability and potential liability should encourage the condominium association to maintain the common areas. A condominium association's failure to comply with this standard would be easily discernible by the trier of fact. It is unlikely, however, that a comparable duty to protect unit owners from the criminal attack of third parties will be imposed on

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130. Virginia Elec. & Power Co. v. Savory Constr. Co., 224 Va. 36, 294 S.E.2d 811 (1982). Of course, the violation of the statute must be the proximate cause of the injury, and the injured party must be a member of the class for whose benefit the statute was enacted.

131. *See supra* note 51.

132. *See supra* note 52.

133. *See, e.g.*, Schoondyke v. Heil, Heil, Smart & Golee, Inc., 89 Ill. App. 3d 640, 411 N.E.2d 1168 (1980) (Since defendants, by virtue of the declaration and bylaws, had voluntarily assumed a duty of snow removal not imposed upon them by common law, the court concluded that, as a matter of law, defendants owed a duty to plaintiff to remove natural accumulations of snow and ice.).

a condominium association. While various theories of contractual and tort liability have been asserted successfully in the landlord context in other jurisdictions, Virginia still adheres to the common law rule that a landlord is under no duty to protect his tenants from the criminal acts of third parties. Until the Virginia courts depart from this standard in the landlord-tenant context, it is unlikely that there will be a dissimilar development in the area of condominium law.