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Balancing Act:
Does a South Carolina Property Owner Have a Duty to Protect its Invitees from Third-Party Crime?

by Robert W. Foster, Jr., Jay T. Thompson, and Brandon S. Smith [1]

Is a property owner liable when a person is injured on its property by a criminal act committed by a third party over whom the property owner has no control? This question is the preliminary legal issue in a premises liability, third-party crime case. As crime in the United States has become an increasing societal problem, courts have established analytical structures to determine whether a plaintiff can and should recover from the property owner. As set forth below, the analysis in third-party crime cases turns on which test the court applies to determine whether the third-party criminal act was foreseeable. This article discusses four tests applied in different jurisdictions and explains the "balancing test" South Carolina adopted in *Bass v. Gopal, Inc.*, 395 S.C. 129, 135-38, 716 S.E.2d 910, 913-15 (2011).

A. Legal Duty and Foreseeability

As a general proposition of law, to succeed on a cause of action for negligent or inadequate security in a premises liability case involving harm caused by a third-party criminal act, the plaintiff must prove each of the following elements: (a) the defendant owed a duty of care to the plaintiff; (b) the defendant breached that duty; (c) the breach was the legal or proximate cause of the plaintiff's injury; and (d) the plaintiff suffered damages.[2]

The property owner has a legal duty to protect against such harm only when the criminal act in question was legally foreseeable. *Id.* at 134-35, 716 S.E.2d at 913.[3] If the third-party criminal act was not legally foreseeable, then the property owner owes no legal duty to the injured party, and the plaintiff's claim should never get to the jury. *Id.*[4] Therefore, foreseeability is a key element that the plaintiff must prove.

B. Tests For Establishing Foreseeability

Courts and commentators have identified four tests applied in different jurisdictions to determine whether a landowner owes a duty to protect a patron from third-party criminal acts: (1) the "imminent harm" or "specific harm" test; (2) the "prior similar incidents" test; (3) the "totality of the circumstances" test; and (4) the "balancing test." *Id.* at 135-38, 716 S.E.2d at 913-15.[5] Each test is discussed separately below.

A criminal act is foreseeable if the property owner knows or has reason to know the act is reasonably likely to occur. A property owner "knows" that a third-party criminal act is going to occur when the property owner has actual knowledge—when the property owner has been informed in advance. Examples include bomb threats or warnings of gang violence. However, whether a property owner "has reason to know" a third-party criminal act is going to occur is a more fact-sensitive question. This question may be dispositive of a third-party crime case.

Foster

Thompson

Smith

1. "Imminent Harm" or "Specific Harm"

The "imminent harm rule" provides that "a landowner owes no duty to protect patrons from violent acts of third-parties unless he is aware of specific and imminent harm about to befall him." *Id.* at 135, 716 S.E.2d at 913. Prior to *Bass*, this was the law of South Carolina, as set forth in *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977), although it was called into question by the Court of Appeals in *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000). In *Shipes*, the plaintiff was assaulted at night by a third-party in the parking lot of a grocery store. The plaintiff alleged there was a breach of the duty to exercise reasonable care for his protection because the evidence indicated that parking lot lights were either not shining brightly or were not turned on, and therefore, the grocery store failed to adequately light its parking lot. The court concluded the store did not have a legal duty to protect the plaintiff in these circumstances. The incident occurred between 7:30 p.m. and 8:00 p.m. The evidence indicated that the neighborhood where the store was located included several bars, a liquor store, an awning company, and a real estate insurance company. No violent crimes had been committed in the neighborhood, and the only crimes known by the store manager to have occurred at the store

were the theft of an employee's cassette tape deck in the parking lot and shoplifting in the store. One arrest, for an unspecified offense, had been made in the parking lot between 10:00 p.m. and 11:00 p.m. Based on this evidence, the court affirmed a directed verdict for the store, concluding that the store owner "did not know or have reason to know of criminal attacks such as the one on [the plaintiff]." 269 S.C. at 485, 238 S.E.2d at 169. The *Shipes* court held that Piggly Wiggly did not know or have reason to know the specific assault at issue would occur, so the defendant owed no legal duty to protect the plaintiff from the third-party criminal act.

The South Carolina Court of Appeals questioned *Shipes* in *Miletic*, which involved a customer who was abducted from a Wal-Mart parking lot and brought an action against the store for failing to protect her from this third-party criminal act. The Court of Appeals followed *Shipes* because it was the law of South Carolina, holding Wal-Mart did not have a duty to protect the plaintiff because it did not know or have reason to know the specific criminal act at issue was about to occur. However, the court also questioned the propriety of the imminent harm test and laid the groundwork for the Supreme Court to abandon it. The court noted that *Shipes* relied primarily on a similar Tennessee case but that "the law ha[d] evolved in other jurisdictions since . . . *Shipes*," observing the Tennessee Supreme Court had overruled that case in 1996. 339 S.C. at 331, 529 S.E.2d at 69-70.

2. "Prior Similar Incidents"

The "prior similar incidents" test provides that "foreseeability may only be established by evidence of previous crimes on or near the premises." *Bass*, 395 S.C. at 135-36, 716 S.E.2d at 913.[6] This test envisions that a past history of criminal conduct will put the property owner on notice of a future risk. Courts applying this test consider the nature and extent of the previous crimes, as well as their frequency and similarity to the crime in question. The basic rationale is if similar crimes have occurred on or near the property in question, the premises owner should take reasonable steps to protect against reoccurrence. Trial courts are given some leeway in determining what qualify as "substantially similar" crimes. "[S]ome courts require that prior crimes be of the same general type and nature as the offense at issue, while others will impose a duty to protect patrons based on past crimes of any type." *Id*. at 135-36, 716 S.E.2d at 913-14 (internal citation omitted). For example, the Georgia Supreme Court held:

> In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activity and their likeness, proximity or other relationship to the crime in question. While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. . . . [What] is required is that the prior [incident] be sufficient to attract the [landlord's] attention to the dangerous condition which resulted in the litigated [incident].

Doe v. Prudential-Bache, 492 S.E.2d 865, 867 (Ga. 1977).

3. "Totality of the Circumstances"

The "totality of the circumstances" test is more liberal than the "prior similar incidents" test because the plaintiff can utilize additional factors in establishing foreseeability. This test, which is used in the majority of jurisdictions, considers "all relevant factual circumstances, 'including the nature, condition, and locations of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.'" *Bass*, 395 S.C. at 135-36, 716 S.E.2d at 913 (quoting *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 972 (Ind.1999)).[7] It has been summarized as follows: "[a] substantial factor in the determination of duty is the number, nature, and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable." *Delta Tau Delta*, 712 N.E.2d at 973. This test is generally regarded as a more relaxed legal burden on plaintiffs because it considers additional factors to establish foreseeability.

Two California cases illustrate the difference between the "prior similar incidents" test and the "totality of the circumstances" test. Prior to 1985, California had settled on the "prior similar incidents" test in determining a property owner's liability for harm caused by third-party criminal acts. Then, in *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653 (Cal. 1985), California changed the test for proving foreseeability to "totality of the circumstances." However, in 1993, the California Supreme Court reverted to the "prior similar incidents" rule in *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993).

In *Isaacs*, the plaintiff, an anesthesiologist associated with the defendant private hospital, was shot by a stranger in the hospital's parking lot and brought a negligence action against the hospital for inadequate security. The court identified the issue as "whether foreseeability, for the purposes of establishing a landowner's liability for the criminal acts of third persons on the landowner's property, may be established other than by evidence of prior similar incidents on those premises. . . . [F]oreseeability is of primary importance in establishing the element of duty." *Isaacs*, 695 P.2d at 657. The court held that "foreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical 'prior similar incidents' rule." *Id.* at 659.

The court took into account the following factors: the hospital was located in a high crime area, several threatened assaults had occurred in the emergency room near the parking lot, prior thefts in the area, incidents involving harassment were common, expert testimony that emergency room facilities and surrounding areas are "inherently dangerous," burned out lights in the parking lot, no security in the parking lot at the time the incident occurred, and security personnel was unarmed. *Id.*

The *Isaacs* court's rationale imposed an extremely high duty on property owners to protect their invitees from the criminal conduct of third parties, and the California Supreme Court retreated from the "totality of the circumstances" test in *Ann M.* and resurrected the "prior similar incidents" test. The plaintiff in *Ann M.* was raped at her place of employment and filed a complaint against the property owner for inadequate security. The court was faced with whether the shopping center owner's duty to maintain common areas and control in a reasonably safe condition included hiring security guards. *Ann M.*, 863 P.2d at 209. The court initially noted that "random, violent crime is endemic in today's society." *Id.* at 214. In light of the increase of violent crime and upon further reflection, the California Supreme Court decided to "refine" the rule it declared in Isaacs only eight years earlier. *Id.* at 215. In doing so, the court evaluated the facts of *Ann M.* under the "prior similar incidents" test and concluded that the scope of the defendant's duty did not include providing security guards. *Id.* at 216. The *Ann M.* court held:

> [T]he requisite degree of foreseeability [requiring the shopping center owner to provide security guards] rarely, *if ever,* can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would . . . force landlords to become the insurers of public safety, contrary to well-established policy in this state.

Id. at 215-16 (emphasis added).

Whereas *Isaacs* held that "foreseeability is *but one factor* to be weighed in determining whether a landowner owes a duty in a particular case," 695 P.2d at 658 (emphasis added), *Ann M.* held that foreseeability was a "*crucial factor* in determining the existence of a duty." 863 P.2d at 214 (emphasis added). Under either the prior similar incidents test or the totality of the circumstances test, the plaintiff has the burden of establishing the property owner knew or should have known the criminal act was foreseeable. Under both tests, foreseeability is required before the property owner owes any legal duty to the injured patron. Under both tests, the court determines, as a matter of law, whether a duty is owed or summary judgment appropriate. Under both tests, any alleged negligent conduct on the part of the hotel is irrelevant if no legal duty is owed. The difference between the two tests is the totality of the circumstances test allows the court to consider almost any factor in determining whether a third-party criminal act was foreseeable, whereas the prior similar incidents test is limited to prior similar crimes on or near the premises. Therefore, the totality of the circumstances test makes it far more difficult for a defendant to win summary judgment on the issue of foreseeability in a third-party crime case.

4. *Bass* and the "Balancing Test"

In *Bass*, the Supreme Court analyzed the three tests described above and abandoned prior South Carolina law to adopted a fourth test known as the "balancing test." The issue in *Bass* was whether a motel owner had a duty to protect a motel guest from being shot by a trespasser over whom the motel had no control. George Bass rented a room for an extended period at Super 8 Motel in Orangeburg, South Carolina, while he and several co-workers performed refrigeration work at a local grocery store. The Super 8, "an exterior corridor-style motel," was owned and operated by Gopal, Incorporated ("Gopal"). *Bass*, 395 S.C. at 132, 716 S.E.2d at 912. During the night, Bass and his roommate heard a knock at their motel room door. After looking through the peep hole of the door, Bass's roommate did not see anyone outside. Several minutes later, they received a second knock and noticed a man standing at the door, but they did not open the door. After a third knock, Bass and his roommate answered the door, without looking through the peep hole, and found the same man standing several feet from the door. The man pointed a gun at Bass and asked for his money "in unsavory terms." *Id.* at 133, 716 S.E.2d at 912. Bass refused, and the man shot Bass in the leg and fled. Bass subsequently filed suit against Gopal and Super 8, alleging the motel was negligent in failing to protect him from the third-party crime.

The circuit court granted summary judgment in favor of Gopal and Super 8, finding they did not owe a duty to Bass because the third-party criminal act was not foreseeable. The court of appeals affirmed the circuit court on the same basis, applying the prior similar incidents test described above. On appeal to the Supreme Court,[8] Bass argued the Court of Appeals placed "too much of an emphasis on the lack of evidence of other crimes committed at the motel prior to the assault" but instead "should have considered the evidence submitted as a whole." *Id.* at 134, 716 S.E.2d at 912-13. The Supreme Court stated that "a business owner has a duty to take reasonable action to protect its invitees against the foreseeable risk of physical harm" and assessed the "four basic approaches to . . . foreseeability" in the following ways. *Id.* at 135, 716 S.E.2d at 913.

First, the *Bass* court abandoned the imminent

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harm test because it considered this approach "outdated" and "too minimal a duty on business owners to protect patrons," finding the reasoning of Miletic more persuasive than that of *Shipes*. *Id*. at 135, 716 S.E.2d at 913. *See also Posecai v. Wal-Mart Stores*, 752 So.2d 762, 766-67 (La. 1999) ("Courts have generally agreed that this rule is too restrictive in limiting the duty of protections that business owners owe their invitees.").

Second, the *Bass* court considered the prior similar incidents test. Both the circuit court and the court of appeals in *Bass* used the prior similar incidents test to examine whether the plaintiff raised a genuine issue of material fact to survive summary judgment. However, the Supreme Court did not follow this approach, stating "the rule leads to results contrary to public policy," lends itself "to arbitrary results and distinctions," and "erroneously equates foreseeability of a particular act with previous occurrences of similar acts." *Id.*

Third, the *Bass* court considered the totality of the circumstances test but stated that it "shifts too great a burden on business owners, and effectively requires businesses to anticipate crime by virtue of the unfortunate fact that crime is endemic in today's society." *Id*. at 138, 716 S.E.2d at 915.

Finally, the *Bass* court adopted a fourth option known as the "balancing test," which "'acknowledges that a duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed.'" *Id*. at 138, 716 S.E.2d at 915 (quoting *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 901 (Tenn.1996)).[9] The court reasoned that "the more foreseeable a crime, the more onerous is a business owner's burden of providing security." *Id*. "Under this test, the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." *Id*.

The *Bass* court acknowledged the criticism surrounding the balancing test, namely that the test "bleed[s] the line between duty and breach." *Id*. at 139, 716 S.E.2d at 915. However, the court reasoned that this approach does not alter the existing duty "on business owners to employ reasonable measures to protect invitees from foreseeable harm." *Id*. Instead, the balancing test "elucidate[s] how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." *Id*. Quoting Judge Posner of the Seventh Circuit Court of Appeals, the court stated "'the hotel should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs . . . to the hotel's guests.'" *Id.* at 138-39, 716 S.E.2d at 915 (quoting *Shadday v. Omni Hotels Mgmt. Corp*., 477 F.3d 511, 514 (7th Cir.2007).).

Although it labeled its analysis as a "balancing test," the *Bass* court's analysis resembled the totality of the circumstances test in that it analyzed numerous facts and circumstances to determine whether the third-party criminal act was foreseeable. The court considered a CRIMECAST report [10] offered by Bass to demonstrate that the Super 8 motel had an elevated risk crime based on national and state averages. The court stated "[t]he especial high probability of crime at the Super 8 compared to the national and state averages raised at least a scintilla of evidence that the crime against [Bass] was foreseeable." *Id*. at 140, 716 S.E.2d at 916. The court evaluated whether Bass provided any evidence that Gopal's "preventative actions were unreasonable given this risk." *Id*. Although Bass asserted that Gopal should have "either hired a security guard to patrol the premises or installed a roving camera security system," the court reasoned that "the hiring of security personnel is no small burden" especially "[c]onsidering a business's economic interest." *Id.* at 141, 716 S.E.2d at 916-17. The court found it "difficult to imagine an instance where a business would be required to employ costly security guards in the absence of evidence of prior crimes on the premises." *Id*. However, the court reasoned that a property owner like Gopal "in a high crime area" even "without evidence of prior criminal incidents may be required to institute less costly measures to offset an elevated risk of harm, such as installing extra lighting, fences, locks, or security cameras, or simply training existing personnel on best security practices." *Id*. at 141, 716 S.E.2d at 917.

Even though the Supreme Court found that Bass raised at least a scintilla of evidence as to foreseeability of a criminal assault, thus raising "at least a scintilla of evidence that the crime against [the plaintiff] was foreseeable," *Id*. at 141, 716 S.E.2d at 916, the court still affirmed summary judgment in favor of Gopal because Bass failed to present evidence that Gopal's "preventative measures were unreasonable under the circumstances." *Id*. at 134, 716 S.E.2d at 912-13. The court found it persuasive that "the only evidence supplied by [Bass] that spoke to the reasonableness of [Gopal's] precautions" was the findings of his own expert witness, who gathered criminal incident data several years after the incident occurred and testified that there wasn't enough data to suggest that Gopal needed to "spend a bunch of money" on extra security measures. *Id*. at 141, 716 S.E.2d at 917. Therefore, the court held that, because the expert "failed to provide any evidence that [Gopal] should have expended more resources to curtail the risk of criminal activity that might have been probable," the court of appeals properly affirmed summary judgment in Gopal's favor. *Id*.

C. Implications and Conclusion

After *Bass*, the "balancing test" is the guiding analysis in South Carolina to determine whether an

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to introduce the actual payment amount to challenge the reasonableness of the plaintiff's medical expenses.").

18 *Rose v. Via Christi Health Sys., Inc./St. Francis Campus*, 279 Kan. 523, 529, 113 P.3d 241, 246 (2005).

19 *Id.*

20 233 P.3d 205, 222 (Kan. 2010).

21 *Id.* at 226-27 (internal citations omitted).

22 *See, e.g., Stanley v. Walker,* 906 N.E.2d 852, 858 (Ind. 2009) ("The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.").

23 344 S.C. 366, 370, 544 S.E.2d 617, 619 (2001).

24 *Id.*

25 *Id.*

26 *Id.* (citing *Pearson v. Bridges,* 337 S.C. 524, 533, 524 S.E.2d 108, 113 (Ct. App. 1999)) (internal punctuation omitted).

27 *Id.*

28 *Id.* at 371-72, 544 S.E.2d at 619 (citing *Haltiwanger v. Barr,* 258 S.C. 27, 186 S.E.2d 819 (1972)) (emphasis in original).

29 *Id.* at 372, 544 S.E.2d at 620 (quoting *Martin v. Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969)) (internal punctuation omitted) (internal punctuation omitted).

30 Fed. R. Evid. 702, advisory committee's note (2000 Amendments).

31 An examination of the reliability of scientific testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and its state court analog, *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), are beyond the scope of this article. For an explanation of these cases and the distinctions between the state and federal rule, see Young, The Hon. Roger M., *How Do You Know What You Know: A judicial perspective on Daubert and Council/Jones Factors in Determining the Reliability of Expert Testimony in South Carolina*, 15 S.C. Law. 28 (Nov. 2003).

32 347 S.C. 210, 213, 553 S.E.2d 488, 489 (Ct. App. 2001).

33 *Id.* at 215-17, 553 S.E.2d at 490-91 (Ct. App. 2001) (internal citations omitted).

34 *State v. Harris,* 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995).

35 311 S.C. 185, 188, 428 S.E.2d 1, 2 (Ct. App. 1993)("To be competent as an expert, a witness by reason of study or experience or both must possess such knowledge or skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.").

36 1 Stern and Brown, Litigating Brain Injuries § 6:13.

37 *See generally Hundley ex rel. Hundley v. Rite Aid of S. Carolina, Inc.*, 339 S.C. 285, 295-96, 529 S.E.2d 45, 51 (Ct. App. 2000) (Allowing an economist to testify regarding present value of a life care plan because the information "would have been no less hearsay had the economist made the inquiry from the health care providers himself.").

38 4:09-CV-709-TLW, 2012 WL 527598 at *13 (D.S.C. Feb. 16, 2012).

39 *Id.*. at *13.

40 2:12-MD-02327, 2014 WL 186872 at *13 (S.D.W. Va. Jan. 15, 2014).

41 3:94-CV-78RM, 1997 WL 33479072 (N.D. Ind. Jan. 29, 1997).

42 415 F.3d 162, 171 (1st Cir. 2005).

43 *Id.* at 170.

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innkeeper has a duty to protect its guests from the criminal acts of a third party. Under this standard, property owners must be aware of the propensity and risk of criminal acts in their area and on their property and be prepared to demonstrate the preventative safety measures taken to curtail the risk of criminal activity.

Footnotes

1 Robert W. Foster, Jr. ("Robbie") and Jay T. Thompson are partners, and Brandon S. Smith is an associate in the Columbia office of Nelson Mullins Riley & Scarborough, LLP.

2 This article does not discuss the fact-sensitive matters of breach of duty and damages. Once it is determined that a property owner owes a legal duty to a patron injured by a third party crime, it will almost always be a jury question whether the defendant breached its duty of care. A property owner is not liable for damages suffered by a plaintiff unless its breach of duty is the proximate cause of the alleged injuries. *Daniel v. Days Inn, Inc.*, 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987).

3 *See also Posecai v. Wal-Mart Stores*, 752 So. 2d 762 (La. 1999); *Sturbridge Partners, Ltd., et al. v. Walker*, 482 S.E.2d 339 (Ga. 1997).

4 *See also Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207, 214 (Cal. 1993); *Nicole M. v. Sears, Roebuck & Co.*, 76 Cal. App. 4th 1238, 1244 (Cal. Ct. App. 1999).

5 *See also* Steven C. Minson, Note: A Duty Not to Become a Victim: Assessing the Plaintiff's Fault in Negligent Security Actions, 57 Wash. & Lee L. Rev. 611 (2000).

6 *See also Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756-57 (Tex. 1999); *Sturbridge*, 482 S.E.2d at 341; *Polomic v. Golub Corp.*, 640 N.Y.S.2d 700, 701 (N.Y. App. Div. 1996).

7 *See also Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (Ind. 1999); *Clohesy v. Food Circus Supermkts*., 694 A.2d 1017 (N.J. 1997); *Seibert v. Vic Regnier Builders, Inc*., 856 F.2d 1332 (Kan. 1993).

8 The appeal against Super 8 was dismissed before the Supreme Court issued its October 10, 2011 opinion in *Bass*.

9 *See also Posecai*, 752 So.2d at 767.

10 A CRIMECAST report purports to measure the risk of criminal activity at a particular site and rates the site in comparison to a national average, a state average, and a county average for various categories of crimes.