PREMISES OWNER LIABILITY FOR WRONGFUL ACTIONS OF THIRD PARTIES

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As a general rule, individuals are not required to prevent a third person from causing harm to another. Premises owners and occupiers can, however, find themselves in circumstances whereby they can be held liable for injury or damage brought about by the wrongful actions of third parties.

As is the case with many torts sounding in premises liability, the question of whether a land owner or occupier can be held liable for wrongful actions of third parties hinges on the question of duty. Duty is a threshold question. Where no duty is owed, a property owner is not required to take any action to protect a plaintiff, and the analysis typically will stop there. Questions such as assumption of the risk and contributory negligence are never reached.

I. WHERE DID THE ACT OCCUR?

The first step in the analysis in deciding whether or not a duty is owed in connection with wrongful acts of third parties is to ascertain where the wrongful act was committed. In order for a duty to arise on the part of a premises owner or occupier, the act must have occurred on the premises. Two elements are required: (1) the power and right to admit people to the premises and to exclude people from it, and (2) a substantial exercise of that right and power. *Simpson v. Big Bear*, 73 Ohio St. 3d 130; 1995-Ohio-203; 652 N.E.2d 702.

The Simpson matter involved an attack that occurred in the parking lot of the Graceland Shopping Center, which was home to numerous different stores including Big Bear supermarket. Mrs. Falkenberg had been shopping at Big Bear, and exited the store whereupon she was attacked in the parking lot. Her purse was stolen and she was thrown to the ground and injured. The lease designated the parking lot as a common area, meaning that it was for the joint use of the shopping center's tenants, their customers and employees. This was limited right of use, but not control. Because there was no control of the lot, no duty of care arose. The Court held:

> "Big Bear owed a duty of care to Falkenberg while she was on Big Bear's premises. However, once she finished her business and left the supermarket that relationship no longer existed. Falkenberg then became an invitee of Graceland, the entity which retained possession and control over the areas in which the attack occurred."

Id. at 134.

If the act did occur on a premises that was under possession and control, the next step in the analysis is the question of whether a special relationship existed.

II. WAS THERE A SPECIAL RELATIONSHIP?

Even where the wrongful act occurs on your premises, 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 "special relation" exists between the property owner and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relation exists between the property owner and the injured individual which gives to the injured individual a right to protection. *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St. 3d 77, 458 N.E.2d 1262. Thus, absent a special duty to either control the behavior of the wrongdoer or a special duty to protect the injured individual, the premises owner or occupier may not be held liable.

Perhaps the most common example of a "special relationship" is that of business owner and business invitee. In the Big Bear matter, cited above, Mrs. Falkenberg had been an invitee of Big Bear, but that special relationship terminated once she left the store's premises and made the transition onto the common area owned and controlled by the shopping center.

Other examples of a special relationship that may give rise to a right of protection include:

– carrier and passenger,
– inn keeper and guest,
– employer and employee,
– host and social guest,
– custodian and person taken into custody, and
– relations established by contract.

Examples of a special relationship giving rise to a duty to control a third person's conduct include:

– parent and child,
– master and servant, and
– custodian and person with dangerous propensities.

III. WAS THE INCIDENT FORESEEABLE?

It is fundamental that in Ohio there can be no liability on the part of a land owner or occupier absent foreseeability. "When an occupier of a premises for business purposes does not, and could not in the exercise of ordinary care, know of a danger which causes injury, he is not liable therefore." *Mauter v. Toledo Hospital, Inc.* (1989), 59 Ohio App.3d. 90, 571 N.E.2d 470, at syllabus. This is equally true in circumstances involving allegations of liability based upon wrongful acts of third parties.

Ohio law establishes that as a general rule, there is no duty to anticipate or foresee criminal activity. *Howard v. Rogers* (1969), 19 Ohio St.2d 42, 47.

> "Thus, the duty to protect invitees from the criminal acts of third parties does not arise if the business owner 'does not, and could not in the exercise of ordinary care, know of a danger which causes injury to [its] business invitee ...' ."

Reitz v. May Co. Dept. Stores (1990), 66 Ohio App.3d 188.

In the *Reitz* matter, Mrs. Reitz was attacked and stabbed during the theft of her automobile in the parking lot of the May Company. Although Plaintiff proffered evidence of prior car thefts and a nearly identical incident occurring approximately three (3) years prior, this was insufficient to establish the requisite foreseeability under the totality of the circumstances.

> "In addition to the totality of the circumstances presented, a court must be mindful of two other factors when evaluating whether a duty is owed in cases such as this one. The first is that a business is not an absolute insurer of the safety of its' customers. The second is that criminal behavior of third persons is not predictable to any particular degree of certainty. It would be unreasonable, therefore, to hold a party liable for acts that are for the most part unforeseeable. Thus, the totality of the circumstances must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others."

Id at 193-194.

While some Ohio courts have examined the question of foreseeability purely by focusing on the existence of prior similar acts, the prevailing view is to ascertain whether a danger posed by a third party was foreseeable by using the "totality of the circumstances" enumerated in *Reitz*. This test not only takes into consideration past experiences, but also looks to such factors as the location of the business and the character of the business to determine whether the danger was foreseeable.

In examining the totality of the circumstances, factors to look at regarding foreseeability from the perspective of one who has a special relationship giving rise to a duty to safeguard may include:

– Whether the incident occurred in a high crime area;
– the frequency of prior incidents of a similar nature;
– the relative size of the area involved;
– whether prior incidents were of a violent or non-violent nature;
– whether the area was guarded or unguarded; and
– the time of day when the incident occurred.

In examining foreseeability from the perspective of one whose special relationship gives rise to a duty to control a third person's conduct, factors to look at might include:

– the known character of the third person;
– past conduct of that person;
– known tendencies of the person; and
– the temptation or opportunity that the circumstances may afford for mischief.

IV. DUTY TO AID

A separate but related question arises in connection with the issue of what duty is owed to give aid and assistance after a wrongful act by a third party has taken place. Whereas one who has a special relationship may be completely unable to foresee the wrongdoing of the third party, an additional duty to come to the aid of an individual might arise once the harm becomes known.

The case of *Heys v. Blevins* (June 13, 1997), Montgomery App. No. 16291, unreported, is illustrative. In this case, Ms. Heys was a patron of the Cut and Curl Beauty Salon, owned by Victoria Vance. While sitting under a hair dryer in Ms. Vance's salon, Ms. Heys was violently attacked by Glenda Blevins who pulled her out from under the hair dryer, beat her, dragged her outside, and continued to beat her. When she was sued by Ms. Heys, Ms. Vance, the salon owner, argued that the attack by Blevins was unforeseeable, and the trial court agreed, granting summary judgment in her favor. The Second District Court of Appeals agreed that the initial attack was indeed unforeseeable, but reversed the award of summary judgment based on the fact that the "special relationship" between business owner and invitee continues to exist after the wrongful act is commenced:

> "In our view, this special relationship between business owners and their invitees gives rise to a duty on the part of business owners to "rescue" and/or aid injured invitees just as this special relationship gives rise to a duty on the part of business owners to correct dangerous conditions on their premises and to safeguard invitees from criminal acts of third parties. The rationale for the imposition of these duties is the same -- the store owner is deriving some economic benefit from the presence of the customer and ensuring that invitees are safe is a cost of doing business. Of course, a business owner's duty to rescue and/or aid an injured invitee is, as with the latter two duties, limited to instances where the business owner knew or should have known that the invitee was injured."

Id. at *19-20.

Such a business owner need not take any action until he knows or has reason to know that an invitee is endangered, ill or injured. Further, there is no obligation to take any action which is

unreasonable under the circumstances. "In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn a sick man over to a physician, or to those who will look after him and see that medical assistance is obtained." Id. at *13, quoting Comment (d) to section 314 (A) of the Restatement 2nd of Torts.

The *Heys* court went on to emphasize that where one prevails under a failure to rescue or aid theory, the appropriate measure of damages is that which was proximately caused by the failure to aid. "In other words, the invitee may only recover for any injuries or aggravation of injuries that could have been avoided had the business owner taken reasonable steps to stop the crime or to obtain medical help." Id. at *21.

