Security Services: What Do Community Associations Have a Duty to Protect?

Friday, February 16, 2024
3:00 – 4:10 pm

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ISBN: 978-1-59618-048-2

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2024 Community Association Law Seminar

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Printed in the United States of America

COMMUNITY ASSOCIATION Law Seminar

What Duty Do Community Associations Have to Provide Security

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Introduction

- THESIS: Residents in community associations often look to their associations for security. However, community associations may not be equipped to protect the residents. This presentation will examine security in community associations, including duties and contractual obligations, current trends and emerging technology, insurance implications, and privacy considerations. We end with a discussion on liability, corporate governance strategies, and best practices.

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What's going on in our home states?

- Georgia: Camelot Condominiums
- Utah: Unsolved Murder and New Laws
- California: Some Crime Stats

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Some Helpful Stats

- The FBI's crime statistics estimates for 2022 show that national violent crime decreased an estimated 1.7% in 2022 compared to 2021 estimates:
  - Murder and non-negligent manslaughter recorded a 2022 estimated nationwide decrease of 6.1% compared to the previous year.
  - In 2022, the estimated number of offenses in the revised rape category saw an estimated 5.4% decrease.
  - Aggravated assault in 2022 decreased an estimated 1.1% in 2022.
  - Robbery showed an estimated increase of 1.3% nationally.

(FBI National Press Office, FBI Releases 2022 Crime in the Nation Statistics, https://www.fbi.gov/news/press-releases/fbi-releases-2022-crime-in-the-nation-statistics#:~:text=Murder%20and%20non%2Dnegligent%20manslaughter,an%20estimated%201.1%25%20in%202022; October 16, 2023)

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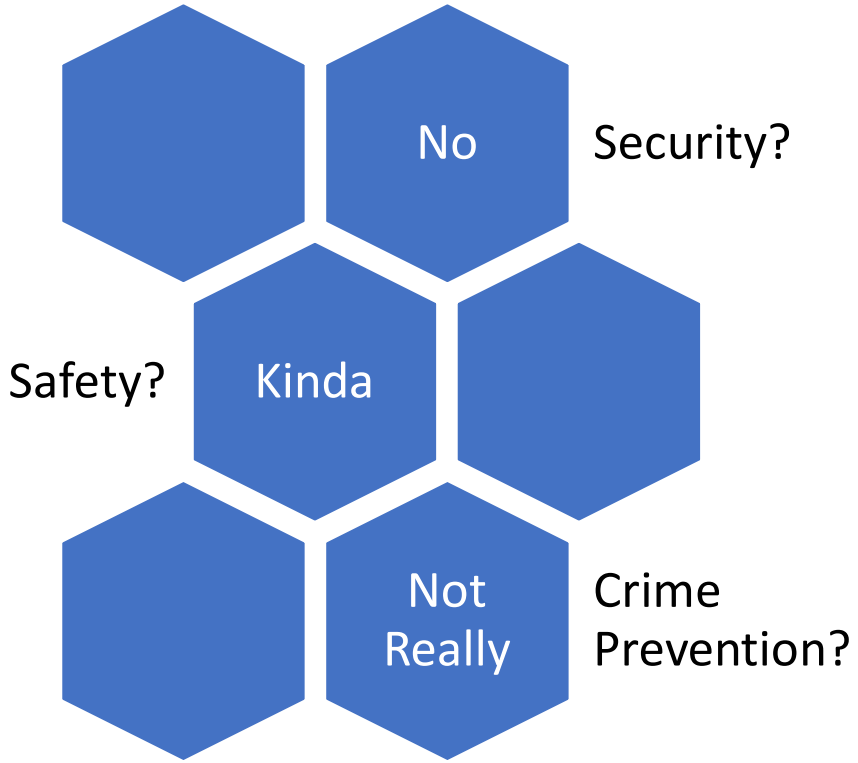
What Role Do Residents Think the Association Plays?



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Community Association	Governmental Entity
No $	Tax $
Security Guard	Police Power
Liability	Immunity

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Theories of Liability for Criminal Acts of Third Parties

- Triggers:
  - Established Duty of Care
  - Special Relationships
  - Foreseeability
  - Voluntary Undertaking
  - Contractual Obligations

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Liability under Common Law

- Trespasser, Licensee or Invitee
- Victim's Status States: Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia and Washington

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Duty of Care

- Community Association Specific Status
  - CT: Condominium Unit Owners = Invitees
  - GA: Community Association owes Duty of Ordinary Care
- Constant Duty of Care: Alaska, California, Colorado, Hawaii, the District of Columbia, Louisiana, Montana, New Hampshire, New York, Oklahoma, and Rhode Island

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Duty Arising from Special Relationships

- Custody of another who is deprived of normal opportunities for self-protection
- Common carrier & passenger, employer & employee, parent & child, innkeeper & guest

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Voluntary Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965)

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Foreseeability

- More than what is possible
- Notice of criminal activity
- Element under defendant's control
- Responsibility
- Knowledge of feature's impact on criminal activity

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Public Policy Considerations

- Moral blame attached to a defendant's conduct
- Desire to prevent future harm
- Extent of the burden to the defendant
- Consequences of imposing a duty
- Availability, cost, and prevalence of insurance for the risk

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Contractual Obligations

- Contracts, including governing documents, can establish a basis for liability
- Contractual language can also protect a community association from liability
- Contractual obligations can be delegated

Read your governing documents!

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The Macallen Building Killings: A Cautionary Tale

Contractual Obligations:

Making daily rounds of facilities, controlling access to residences and common areas, monitoring security cameras, etc.

Management and Concierge assumed Association's duty to protect the building from intruders

Duty:

Association undertook building security, knowledge that intruders could gain access and had previously, understanding that residents relied on Association and its agents to protect them = foreseeability

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Pro Tips

1. Avoid Creating Unwanted Duties
2. Watch Your Language!
3. Take Requests and Feedback Seriously

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More Tips

4. Educate Owners and Residents
5. Maintain and Repair Common Area
6. Amend Governing Documents to Add Exculpatory Clause
7. Purchase Insurance

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Sample Exculpatory Provision

SECURITY. THE ASSOCIATION MAY, BUT SHALL NOT BE REQUIRED TO, FROM TIME TO TIME, PROVIDE MEASURES OR TAKE ACTIONS THAT DIRECTLY OR INDIRECTLY IMPROVE THE SECURITY OF THE CONDOMINIUM; HOWEVER, EACH OWNER, FOR HIMSELF, HERSELF OR ITSELF, AND HIS, HER OR ITS TENANTS, OCCUPANTS, GUESTS, LICENSEES, AND INVITEES, ACKNOWLEDGES AND AGREES THAT THE ASSOCIATION IS NOT A PROVIDER OF SECURITY AND SHALL HAVE NO DUTY TO PROVIDE SECURITY ON OR AT THE CONDOMINIUM. THE GATE IS FOR VEHICULAR ACCESS CONTROL ONLY. THE ASSOCIATION DOES NOT GUARANTEE THAT NON-OWNERS AND NON-OCCUPANTS WILL NOT GAIN ACCESS TO THE CONDOMINIUM AND COMMIT CRIMINAL ACTS ON THE CONDOMINIUM NOR DOES THE ASSOCIATION GUARANTEE THAT CRIMINAL ACTS ON THE CONDOMINIUM WILL NOT BE COMMITTED BY OTHER OWNERS OR OCCUPANTS. IT SHALL BE THE RESPONSIBILITY OF EACH OWNER TO PROTECT HIS, HER OR ITS PERSON AND PROPERTY AND ALL RESPONSIBILITY TO PROVIDE SUCH SECURITY SHALL LIE SOLELY WITH EACH OWNER. THE ASSOCIATION SHALL NOT BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF ITS FAILURE TO PROVIDE ADEQUATE SECURITY OR THE INEFFECTIVENESS OF MEASURES UNDERTAKEN.

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Wrap Up

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What Duty Do Community Associations Have to Provide Security?

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December 28, 2023

I. INTRODUCTION.

Housing ownership in community associations continues to rise nationwide. (FOUND. FOR COMM. ASS'N RESEARCH, *2020-2021 U.S. Nat'l & State Statistical Review*, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://foundation.caionline.org/wp-content/uploads/2021/07/2021StatsReview_Web.pdf (last visited Dec. 27, 2023)). Because associations resemble governments in some ways, municipalities, members and residents understandably are confused about whether their association should be providing them with security, particularly when it appears that their association employs security measures. Meanwhile, crime in associations continues to capture the headlines across the county, creating the perfect storm for misunderstanding, disputes, and litigation.

In Georgia, in 2022, Camelot Condominiums had a reputation of being dilapidated and crime-ridden (Dawn White, *City of South Fulton mayor offers ideas to save condos after living there for 2 months* (Mar. 3, 2022), https://www.11alive.com/article/news/local/city-of-south-fulton-camelot-condos/85-d33e6adf-295f-4aa2-b7b3-61b60307fb25). After years of crime, including a murder, the mayor even moved in to try to better understand the situation.

In 2021, a Utah woman was shot and killed in the driveway of a home in an association that restricted security cameras. In response, the legislature enacted a law that prohibits homeowners associations from banning the installation of security cameras in certain places (Alyssa Roberts, *Utah bill, inspired by unsolved murder, keeps HOAs from prohibiting security cameras*, KUTV (Feb. 26, 2021), https://kutv.com/news/local/utah-bill-inspired-by-unsolved-murder-keeps-hoas-from-prohibiting-security-cameras,).

In 2017, a Boston couple was murdered in their own penthouse condominium unit by a former concierge that exploited known security issues to gain entry to the building. (*Jury Convicts Defendants in 2017 Double Murder*, SUFFOLK CNTY DIST. ATTY OFFICE (Dec. 12, 2019), https://www.suffolkdistrictattorney.com/press-releases/items/2019/12/12/jury-convicts-defendant-in-2017-double-murder). (*Infra* at pp. 18-25).

In ritzy Palo Alto, California, a crime wave has gripped Atlaire Walk Condominium since 2020. Undeterred by cameras, brazen criminals have repeatedly accessed the community to steal, boldly confronting residents in the process. (Gennady Sheyner, *Rocked by thefts, residents at Palo Alto condo complex ask for help* (Feb. 3, 2022), https://www.paloaltoonline.com/news/2022/02/03/rocked-by-thefts-residents-at-palo-alto-condo-complex-ask-for-help).

The authors of this submission practice in different jurisdictions—California, Utah and Georgia—but unsurprisingly have all been confronted with the issue of security and answering the question of what associations must, can, and should do to protect residents and their guests.

In this paper, we examine whether associations have a duty to provide security from third-party criminal acts, the trends emerging across jurisdictions, and the challenges associations face

in this murky area of the law. We also share strategies and best practices for associations to minimize liability.

A. What Role do Residents Think that the Association Plays?

Residents in community associations increasingly look to their associations for security. However, community associations are not equipped or designed to protect residents from third-party criminal acts. With respect to whether a duty is conferred on the association, perception might be, depending on the jurisdiction, everything.

It may be possible that a duty arises when an association voluntarily undertakes various security measures and conducts itself in a way that gives members and residents an expectation of security. For example, where a resident or member sees that the association has installed cameras or license plate readers or employed roving guards, the expectation naturally arises that the association is protecting the residents. Similarly, if a developer sells property pitching the community's security features, the association may be stuck with a duty to provide that security for years to come.

Furthermore, the association's governing documents may confer a contractual obligation to provide security that goes beyond physically maintaining the common areas. The problem is that an association must do this work that is like governmental policing powers without any of the advantages of being a governmental entity, like funding, expertise, technology, and sovereign immunity. Associations simply do not have the resources to stop crime.

B. Comparison of Community Associations Versus Governmental Entities.

The most recent numbers from the U.S. Census indicates that new homes are usually part of a community association. In fact, in 2021, eighty-two percent (82%) of new homes sold in the United States were in a community association—up from sixty-six percent (66%) the year prior.

(*See* U.S. CENSUS BUREAU, *Current Data* https://www.census.gov/construction/chars/current.html (last visited Dec. 27, 2023)).

Whether organized as common law entities or nonprofit corporations, associations are private organizations that do not enjoy the same immunities and governmental resources that their public counterparts receive. Yet, members and residents often demand that their associations take on more responsibilities than the governing documents require and push for their associations to implement new and additional security measures.

One of the starkest disadvantages of associations when compared to local governments is the budget. According to the U.S. Census Bureau's American Housing Survey, the average association assessment is $170 per month with most association members spending only $50 per month in assessments (*See* U.S. CENSUS BUREAU, *American Housing Survey* (Sep. 27, 2022), https://www.census.gov/programs-surveys/ahs/data/2021/ahs-2021-public-use-file--puf-/ahs-2021-national-public-use-file--puf-.html). These assessments cover everything from physical maintenance to insurance premiums and deductibles. By comparison, across the United States, state and local governments spent $389 per capita on police protection in 2020 (*See* URBAN INST., *Criminal Justice Expenditures: Police, Corrections, and Courts*, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures#:~:text=Across%20the%20US%2C%20state%20and,and%20New%20York%20(%24550) (last visited Dec. 27, 2023)). The funding is just not there to be comparable to public safety services.

Furthermore, a volunteer-run board of directors does not have the training, education, experience and time to manage a security operation like that of a formal police force.

Lastly, and perhaps most importantly, associations are not afforded the same immunities that governments receive when protecting association members and residents. Police receive qualified immunity pursuant to 42 U.S.C.A.§1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity*, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Emphasis added).

It is a high bar to make public law enforcement liable. An individual has to prove a violation of an established constitutional right in order to recover damages from the police. In contrast, to establish liability on the part of associations, an individual simply has to prove a breach of contract or liability in tort in order to recover damages. This immunity difference provides the public police with a clear advantage when fighting crime. Yet, criminal activity occurring within an association is increasingly dubbed "a civil issue," leaving boards, managers, and their counsel in a precarious position.

Consequently, associations must navigate the challenges of fulfilling contractual obligations, statutory and common law duties, and the needs and desires of residents without the protection of sovereign immunity.

II. THEORIES UNDER WHICH A COMMUNITY ASSOCIATION COULD BE HELD LIABLE FROM CRIMINAL ACTS OF THIRD PARTIES.

Some states have dealt with the specific question of a community association's liability for third-party crime head on, but for others, this paper extrapolates from caselaw dealing with landowners, landlords, and situations that do not involve a crime but for which the principles and law applied provide the most defensible analysis. The authors note, however, that the unique ownership models of community associations may have implications for a jurisdiction's analysis. *See* *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197, 1202 (Colo. 1994) (concluding that Colorado's landowner liability statute does not apply to determine association's duty as "the owners have a continuing right independent of association consent to make use of the common areas by reason of their ownership of lots in the townhome complex, whereas trespassers, licensees, and invitees have no right to enter in the absence of consent). Moreover, nearly every state has exceptions to the general rule and an idiosyncratic appellate decision or two not addressed in this paper. Lastly, the authors note that the following categories are not exclusive, but merely provide a roadmap for discussing relevant legal authorities.

A. Common Law.

Today, U.S. jurisdictions largely analyze the question of liability for third-party crime using traditional negligence principles, sometimes under established law that a duty does exist based on a victim's status or a special relationship between the landowner or possessor and victim and considering whether the landowner or possessor voluntarily assumed a duty or agreed to provide some service.

1. Duty.

a. Duty dependent on status.

A majority of jurisdictions determine whether a duty is owed to a victim based on the victim's status under common law as a trespasser, licensee, or invitee. The Restatement of Torts (2d) defines each as follows:

> A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Restatement (Second) of Torts § 329 (1965). "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Restatement (Second) of Torts § 330 (1965). Lastly, an invitee is (1)" either a public invitee or a business visitor," (2) "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public, or (3) "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Restatement (Second) of Torts § 332 (1965).

Jurisdictions in which a victim's status determines the duty of a community association include: Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia and Washington. *See* *Edwards v. Intergraph Servs. Co.*, 4 So. 3d 495, 500 (Ala. Civ. App. 2008) (finding that "the duty owed by the landowner to a person injured on his premises because of a condition on the land is dependent upon the status of the injured party in relation to the land." *(quoting* Christian v. Kenneth Chandler Constr. Co., 658 So.2d 408, 410 (Ala.1995)); *Hurst v. Carriage House W. Condo. Owners Assoc., Inc.*, 2017-Ohio-9236, ¶ 10, 102 N.E.3d 1071, 1073; *Lloyd v. Pier W. Prop. Owners Ass'n*, 2015 Ark. App. 487, 470 S.W.3d 293 (2015); *Johnston v. Harris*, 387 Mich. 569, 198 N.W.2d 409 (1972); *Pratt v. Maryland Farms*

Condo. Phase 1, Inc., 42 Md. App. 632, 402 A.2d 105 (1979); *Corley v. Evans*, 835 So. 2d 30 (Miss. 2003) (analyzing victim's claim for negligence as licensee and invitee). *But see* *Brock v. Watts Realty Co.*, 582 So. 2d 438, 440 (Ala. 1991) ("The general rule in Alabama is that landlords and businesses are not liable for the criminal acts of third persons unless such acts were reasonably foreseeable.") (citing *Moye v. A.G. Gaston Motels, Inc.*, 499 So.2d 1368 (Ala.1986); *Ortell v. Spencer Companies*, 477 So.2d 299 (Ala.1985); and *Henley v. Pizitz Realty Co.*, 456 So.2d 272 (Ala.1984)).

In some states, however, the duty owed to a person may be the same whether they are trespassers or licensees. "The Delaware common law rule is that property owners/possessors must refrain from willful and wanton conduct toward trespassers and licensees alike." *Hynson v. Whittle*, No. CV N11C-11-142 EMD, 2013 WL 6913285, at *3 (Del. Super. Ct. Dec. 24, 2013), *aff'd sub nom. Hynson v. Burnbrae Maint. Ass'n*, 108 A.3d 1225 (Del. 2015) (footnote omitted) (unpublished). "For business invitees," such as a social guest of a landowner's tenant, "landowners have a duty to exercise reasonable care in keeping the premises safe." *Id.* at *3 (footnote omitted). Similarly, in Florida, Iowa, Kansas, Massachusetts, and Wyoming, landowners, and presumably community associations, have a duty of reasonable care for licensees and invitees.

b. Community association-specific status.

Both Connecticut and Georgia apply traditional principles of negligence but have established the status of a would-be victim in determining a community association's liability for third-party crime. Where the status is predetermined as the result of a community association's involvement, the critical question is causation; *i.e.*, was a community association's conduct the proximate cause of the victim's harm? The relationship between a condominium unit owner and condominium association are treated similar to the landlord-tenant relationship. *Sevigny v. Dibble*

Hollow Condo. Ass'n, Inc., 76 Conn. App. 306, 321, 819 A.2d 844, 855 (2003). *See also* *Casadontes v. Hayes Servs., LLC*, No. CV106004476, 2010 WL 5065225, at *2 (Conn. Super. Ct. Nov. 24, 2010) (unpublished) ("In Connecticut, condominium unit owners are considered invitees of the condominium, and their relationship with respect to premises liability is analogous to that of landlords and tenants.").

In a more recent Georgia case, *Villages of Cascade Homeowners Ass'n, Inc. v. Edwards*, 363 Ga. App. 307, 870 S.E.2d 899 (2022), the appellate court found that an association was not liable for the armed robbery of a tenant. As discussed in further detail below, the tenant was attacked while a vehicle gate was being repaired. The tenant presented evidence that the Association had suffered from similar criminal activity in the past and the Board was aware of the same. Despite that evidence, the Court of Appeals held that the association had a duty of "ordinary care, i.e., reasonableness and had taken "prompt remedial measures, which resulted in a successful repair, foreclos[ing] liability absent some unsupported conjecture that another reasonable course of conduct by the [association] would have prevented the crime in this case." *Id.* at 902 (footnote omitted).

c. Duty arising from special relationships.

In Minnesota and Maine, no duty generally exists unless a special relationship exists, and the harm is foreseeable. *See* *Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979); *Kaechele v. Kenyon Oil Co.*, 2000 ME 39, 747 A.2d 167; *Bryan R. v. Watchtower Bible & Tract Soc. of New York, Inc.*, 1999 ME 144, 738 A.2d 839. Such special relationships include "when a person voluntarily takes custody of another person under circumstances in which that other person is deprived of normal opportunities for self-protection." *Bjerke v. Johnson*, 727 N.W.2d 183, 189 (Minn. Ct. App.), *aff'd and remanded*, 742 N.W.2d 660 (Minn. 2007) (quotation and internal marks

omitted); *Est. of Cilley v. Lane*, 2009 ME 133, ¶ 17, 985 A.2d 481, 487 ("Certain narrowly defined, special relationships give rise to an affirmative duty to aid and protect, such as the relationship between a common carrier and passenger, employer and employee, parent and child, or innkeeper and guest.").

Similarly, in Oregon, a relationship, special status, "or a particular standard of conduct that creates, defines, or limits the defendant's duty" may make a defendant liable. *Piazza ex rel. Piazza v. Kellim*, 271 Or. App. 490, 354 P.3d 698 (2015), *aff'd sub nom. Piazza v. Kellim*, 360 Or. 58, 377 P.3d 492 (2016). Otherwise, courts look to whether the defendant's "conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Id.* For example, however, "[r]esolution of the specific issue of whether a landlord's duty encompasses a duty to warn or otherwise protect tenants against a risk of harm is a matter of general foreseeability in the specific circumstances of each case." *Miller ex rel. Miller v. Tabor W. Inv. Co., LLC*, 223 Or. App. 700, 196 P.3d 1049 (2008).

d. Constant duty of reasonable care.

A handful of jurisdictions—Alaska, California, Colorado, Hawaii, the District of Columbia, Louisiana, Montana, New Hampshire, New York, Oklahoma, and Rhode Island—have rejected the Common Law. Instead, courts in these jurisdictions hold that landowners and—at least by implication, community associations—have a duty of reasonable care, regardless of the status of the victim. 62 Am. JUR. 2D Premises Liability § 37 (1972); *Evers v. FSF Overlake Assocs.*, 2003 OK 53, 77 P.3d 581. Nonetheless, foreseeability remains the critical inquiry for determining liability for third-party criminal acts.

For example, in Alaska, "landowners have a duty to use due care to guard against unreasonable risks created by dangerous conditions existing on their property but aside from

activities induced by attractive nuisances, the definition of conditions that landowners may be required to protect against does not include the conduct of third parties." *Hurn v. Greenway*, 293 P.3d 480, 483–84 (Alaska 2013) (footnote and internal quotation marks omitted). However, "a landowner might have a duty to control the actions of a third party if those actions were sufficiently related to a condition on the land." *Id.* at 484 (footnote omitted).

e. The Voluntary Undertaking Exception.

More relevant to this paper is the special relationship that exists "when a defendant undertakes for another, gratuitously or for consideration, to perform a duty owed by the other to a third person." *Bjerke v. Johnson*, 727 N.W.2d 183, 190 (Minn. Ct. App.), *aff'd and remanded*, 742 N.W.2d 660 (Minn. 2007) (citation omitted). The Restatement (Second) of Torts § 324A (1965) states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

As one South Carolina court stated, "[a]lthough a landlord generally has no duty to provide security to protect tenants from criminal acts of third parties, a landlord who undertakes to provide security measures may be liable if the undertaking is performed negligently." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019) (citation omitted).

Moreover, where a special relationship might impose a duty not applicable to the landlord-tenant relationship—such as a duty to protect another from third-party crime—"the voluntary undertaking doctrine forms an exception to this general rule." *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995, 841 N.E.2d 96, 107 (2005). Under the voluntary undertaking doctrine, a "landlord may be held liable for the criminal acts of third parties when it voluntarily undertakes to provide security measures, but performs the undertaking negligently, if the negligence is the proximate cause of injury to the plaintiff." *Id.* at 995-96 (quotations and internal marks omitted).

The Lago Grande condominium project in Florida provides a prime example. Lago Grande was initially touted for its safety, with part of the Lago Grande association assessments dedicated to security provisions. *Vazquez v. Lago Grande Homeowners Ass'n*, 900 So. 2d 587, 589 (Fla. Dist. Ct. App. 2004). The Lago Grande association hired a professional security service "to protect the safety of residents and guests," and the Lago Grande association president "verified that the residents and guests had a right to expect that the complex would be safe, as promised." *Id.* After the initial security service, Florida Patrol, abandoned Lago Grande, the community hired Centurion Protective Services, Inc. *Id.* The Lago Grande association and Centurion would later dispute whether the association provided sufficient resources and funding to provide adequate security. *Id.* Regardless, one evening the estranged husband of a woman visiting a resident entered Lago Grande in contravention of both the resident's request and the association's security protocols. *Id.* at 589-90. Tragically, the estranged husband murdered his wife and shot the resident. *Id.* at 590.

"In the situation in which a duty to prevent harm from criminal activity arises only as an aspect of the *common law* duty to exercise reasonable care to keep the premises safe, prior offenses, giving rise to the foreseeability of future ones, may be deemed indispensable to recovery." *Id.* at 592 (emphasis in original). Based on expert testimony and the testimony of the association

President, however, the Florida appellate court found that "Lago Grande assumed and contracted to fulfill a duty to protect the safety of its residents and guests, and Centurion assumed a contractual obligation to do so." *Id.* at 590. The developer's advertisement of Lago Grande as prioritizing security and charging for it, as well as the governing documents' requirement for professional security, were critical in the *Vazquez* Court's analysis. *Id.* at 590-91. Ultimately, the Vazquez Court stated "the duty to guard against crime in this case is founded upon particular undertakings and hence obligations of the defendants to do so." *Id.* at 593 (citations omitted).

Important to community associations is that with a voluntary undertaking, negligence may be found either where "whether the harm to the other or his things results from the defendant's negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it." Restatement (Second) of Torts § 323. Thus, where a community association assumes responsibility for safety and security, it must adequately fulfill that responsibility and not simply abandon it without proper process, such as amending the governing documents to expressly disavow such responsibility.

2. Foreseeability.

Historically, landowners and possessors have faced potential liability for foreseeable dangers. Third-party criminal acts were, for much of U.S. jurisprudence, considered not foreseeable. Courts rationalized that once a third-party enters the scenario, particularly a third-party with devious intentions, the outcome is no longer foreseeable.

While the general rule may have once been that third-party criminal acts are intervening causes and not foreseeable, the legal landscape has been slowly evolving. In 1970, the U.S. Court of Appeals for the District of Columbia reviewed the analysis of liability for third-party crime in the context of landlord-tenant relationships, noting "certain duties have been assigned to the

landlord because of his control of common hallways, lobbies, stairwells, etc., used by all tenants in multiple dwelling units." *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 480 (D.C. Cir. 1970). And, while the *Kline* Court acknowledged the various policy reasons for applying the "general rule" to landlord-tenant cases, it recognized that the characteristics of modern living in multiple-family dwellings undermined that reasoning. *Id.* at 481.

Where a community association exercises control over common areas, a similar rationale applies. If a third-party criminal act was foreseeable and would have been prevented by something the association should have done, the community association may be liable. Yet, as the *Kline* Court opined, "foreseeable" is not the same as "possible." *Id.* at 483.

> Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arm of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist [to] provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.

Id. (footnote omitted). But, where a community association has notice of crimes occurring in areas under its control, a future third-party criminal act may be found to have been foreseeable. *See id.*

In *Medcalf v. Washington Heights Condo. Ass'n, Inc.*, 57 Conn. App. 12, 747 A.2d 532 (2000), the Connecticut appellate court considered a case in which the association-maintained intercom system malfunctioned and could not be used to remotely let a visitor inside. Before the condominium resident could let her visitor in personally, the visitor was attacked. The *Medcalf* Court noted that "the plaintiff offered no evidence that the malfunctioning intercom system was designed to provide security to a person outside the building." *Medcalf v. Washington Heights Condo. Ass'n, Inc.*, 57 Conn. App. 12, 18, 747 A.2d 532, 536 (2000). Thus, "[t]he defendants' failure to maintain the intercom system was inconsequential and was not the proximate cause of

the assault." *Id.* Concerningly, perhaps the Court's decision would have been different had the entry system been malfunctioning and ignored, leaving a resident struggling to enter when attacked.

The Arizona case of *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.*, 189 Ariz. 206, 941 P.2d 218 (1997) is also instructive. In *Martinez*, the Arizona Supreme Court relied on the Restatement of Torts in a lawsuit brought by a tenant's guest who was shot in while attending a graduation party in the Woodmar condominium complex parking lot. The *Martinez* Court noted, "The duty to those using the common areas with consent of the association, its unit owners, and their tenants, includes the use of reasonable care to prevent harm from criminal intrusion." *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.*, 189 Ariz. 206, 210, 941 P.2d 218, 222 (1997). In this case, the association was aware of increased gang activity and had even been warned by its security guard that the project needed 24-hour security patrols. *Id.* at 223. Reversing the trial court's grant of summary judgment in favor of the association, the *Martinez* Court concluded that the association did have a duty based on its relationship with those permissibly using common areas and a jury could find that the harm that befell Martinez was foreseeable. *Id.* at 224.

In an earlier but seminal case, *Frances T. v. Vill. Green Owners Assn.*, 42 Cal. 3d 490, 723 P.2d 573 (1986), the California Supreme Court held that a condominium association owes the same duty to its residents as a landlord to her tenants. *Id.* at 499-500. Moreover, where the individual board members had knowledge that the Village Green community's conditions, including a lack of exterior lighting, contributed to increased crime, they could be held personally liable for negligence, both for requiring the victim to remove the unapproved lighting she installed on the exterior of her unit and for failing to remediate the lack of lighting around her building. *Id.*

at 508-10. The *Frances T.* Court's analysis consistently refers back to the knowledge the association and the independent directors had regarding an increase in crime in the project and their awareness that increased lighting was directly correlated with decreased crime. As a result, even requiring unapproved lighting fixtures be removed or failing to promptly repair or replace lighting, access gates, or other elements may lead to serious liability.

3. Policy Considerations.

Like in *Kline,* public policy also plays a role in determining liability for third-party crime. For example, Montana courts consider whether a harm was foreseeable as well as policy considerations, which include (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the risk involved. *Phillips v. City of Billings,* 233 Mont. 249, 758 P.2d 772 (1988).

B. Contractual Obligations.

Even where general principles of negligence are used to determine liability, a community association may have a duty that arises from its governing documents, particularly the allocation of responsibility for certain elements. *See Booker v. White Oak Condo. Ass'n, Inc.*, No. CIV.A. 06C-02-011JTV, 2007 WL 2677065, at *2 (Del. Super. Ct. Aug. 28, 2007). For example, Arkansas has specifically found that a community association may assume through its governing documents a duty. Where a community association has contractually agreed to be responsible for common areas, the community association assumes a duty of care. *Lloyd v. Pier W. Prop. Owners Ass'n,* 2015 Ark. App. 487, 13, 470 S.W.3d 293, 302 (2015).

Similarly, in North Carolina and North Dakota, the law is that generally no duty applies unless the harm is foreseeable or there is an agreement to render services necessary for protection. *Quail Hollow E. Condo. Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12 (1980); *Hometown Living, LLC v. R.H. Rogers & Assocs.*, P.C., No. 3:17-CV-00249, 2022 WL 20247547, at *6 (D.N.D. Jan. 31, 2022). *See also* *Meier v. Vistula Heritage Vill.*, 62 Ohio Misc. 2d 632, 609 N.E.2d 1360 (Com. Pl. 1992) (Ohio landlord not liable for attack on tenant where no provision existed in lease which imposed duty to provide security).

Colorado has also eschewed principles of duty based on a person's status as licensee, invitee, or trespasser where the subject property is controlled by condominium or community associations. While control over may give rise to a common law duty of care, "to the extent that the provisions of the operative documents creating the townhome complex and the association prescribe the duties of the association to the townhome owners and are consistent with public policy, those provisions control." *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197, 1202 (Colo. 1994) (citation omitted). Contracts in which a party agrees to perform services, including governing documents "could establish a duty giving rise to tort obligations as well as create contractual obligations." *Id.* at 1203. Absent some applicable contractual provision, Colorado looks to general negligence principles and policy considerations, including "the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor." *Id.* (quotation omitted).

In *Bradford Square Condominium Ass'n, Inc. v. Miller*, 258 Ga.App. 240, 573 S.E.2d 405 (2002), the Georgia Court of Appeals also recognized the critical effect of contractual language in

a case involving a self-managed condominium in metro-Atlanta. In 1990, the declaration was amended to add the following exculpatory clause:

> *Security. The Association may, from time to time, provide measures of security on the condominium property; however, the Association is not a provider of security and shall have no duty to provide any security on the condominium property. The obligation to provide security lies solely with each unit owner individually. The Association shall not be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.*

Id. at 242.

In 1997, two residents were attacked and carjacked in the common element parking lot one evening by three men that had followed them into the community. *Id.* at 243. Tragically, the husband died as a result of the attack. *Id.*

The surviving widow filed a wrongful death action alleging that the association was negligent in the performance of its duty to secure the common elements from third-party criminal acts. *Id.* The widow contended that the installation of security gates and enhanced lighting, institution of security patrols, and the formation of a neighborhood watch would have deterred the attack. *Id.*

However, the Court held that the Association did not owe the unit owners/association members a legal duty to provide security for the common elements against the criminal acts of third parties because the exculpatory clause obviated any duty on the part of the association to provide security for the common elements. *Id.* at 246. The court further held that the duty to physically maintain the common elements does not include providing security. *Id.* at 247.

Similarly, in *Villages of Cascade Homeowners Ass'n, Inc. v. Edwards*, 363 Ga. App. 307, 870 S.E.2d 899 (2022), a tenant in a professionally-managed townhome community in Atlanta was attacked in the common area parking lot when the access control gate was broken. Pursuant to the

covenants, the association was responsible for maintaining the common areas, including the private roads, parking areas, and vehicular entrance and exit gates. *Id.* at 309.

On September 10, 2015, residents noticed that the exit gate was broken. *Id.* at 307. That day, the President e-mailed the manager to request that the gate be repaired. *Id.* One minute later, the manager forwarded the e-mail to the gate contractor. *Id.* On September 12, 2015, the contractor e-mailed a quote to repair the gate to the manager and the association. *Id.* The Association approved the quote the same day. *Id.* at 307-08. Even though a new gate had to be fabricated, the repair was completed within eleven (11) days.

Tragically, however, just after midnight on September 14, 2015, a tenant was attacked, robbed and shot in the parking lot when returned home to the community before the repair was completed. *Id.* at 308. The assailants left through the broken exit gate. *Id.*

The tenant sued the association and the management company for negligence, negligence per se, nuisance, and premises liability and sought compensatory and punitive damages. *Id.* The tenant presented evidence of various criminal activities in the community dating back to 2012, including robbery, burglary, trespassing and vandalism. *Id.*

The appellate court held that the association was not liable because the covenants did not include a duty to provide security. *Id.* at 309. The association, as a landowner, had a duty to invitees to exercise ordinary care to keep the premises safe, but was not an insurer of an invitee's safety. *Id.* In other words, the association had no duty beyond the physical maintenance of the common area and its prompt remedial measures foreclosed liability. *Id.* at 309-10.

Contractual obligations may, however, be delegated. For example, in *Cassell v. Collins* the North Carolina Supreme Court held that the extent of the duty, if any, owed by a security company to a guest who was stabbed at an apartment complex the company was hired to patrol, is governed

by the contract between the security company and the property owner. *Cassell v. Collins*, 344 N.C. 160, 472 S.E.2d 770 (1996), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

III. THE MACALLEN BUILDING KILLINGS: A CAUTIONARY TALE.

In 2017, the brutal killing of two residents in their penthouse condominium unit by a former building concierge shocked the Boston community and has brought renewed attention to the unsettled issue of association security. The details of the crime are chilling, and the recent 2022 trial court decision in the subsequent wrongful death action is a warning to community associations nationwide.

The case of *Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.*, in the Superior Court of the Commonwealth of Massachusetts, Docket No. 1784CV02486-B, involved an 11-story, mid-rise condominium building in South Boston, Massachusetts governed Court Square Press Building Condominium Trust. The tragic facts of the case provide important lessons to associations and their counsel, and the trial court went to great lengths to detail them in its order. [1]

The building was professionally managed by an on-site management agent, Bayberry Management, LLC ("Bayberry"), pursuant to a written management agreement. The building was also served by a fulltime concierge and runner.

The bottom of the building contains an access-controlled three-level parking garage that vehicles access through an electronic garage door that is opened with a personal programed transponder. Above the parking garage are forty-four (44) residential units, including the two (2)

[1] A copy of the Memorandum of Decision and Order on Defendants' Motions for Summary Judgment (papers 38 and 41) is attached as Appendix A hereto.

top-floor penthouse units located on floor 11. The victims, Dr. Richard Field and Dr. Lina Bolanos, resided in one of the penthouse units.

In 2017, the building required a fob to open the lobby's entry doors. A person could also be buzzed in by a concierge. The concierge desk was located in the main lobby adjacent to the entry doors and was equipped with a computer monitor where feeds of the building's fourteen (14) closed-circuit television cameras were viewable. The cameras were located at the entrance to the garage, the lobby, the driveway and various angles of the adjacent Dorchester Avenue.

The building had two (2) elevators. Elevator 1 was a service elevator that could be accessed from the main lobby and the parking garage during the hours of 6:00 a.m. until 4:00 p.m. Anyone could enter the service elevator from the parking garage between those hours, but a fob was required to send the elevator to a residential floor. Only the residents of floor 11 could use a fob to send an elevator to floor 11.

However, a person without a fob could gain access to any floor—including the penthouse units on floor 11—by waiting inside the elevator for it to be called by someone on a residential floor, riding the elevator to that floor, exiting the elevator, and then using one of the internal unlocked stairwells to access the other floors.

Elevator 1 was locked from the garage after 4:00 p.m. and until 6:00 a.m. the next morning and whenever the garage doors were malfunctioning and left open. This management of Elevator 1 was established to limit access to the building from the garage.

In or about October 2015, Bampumim Teixeira ("Teixeira") was hired by the Trust's then-concierge contractor, Palladion Services, LLC ("Palladion"). While working as a concierge in the building, Teixeira learned where the cameras were positioned and how the elevators operated. He would eventually use his inside knowledge to perpetrate his violent crime.

In April 2016, Teixeira quit his job at the building after a confrontation with a resident. In February 2017, the Trust terminated its concierge services contract with Palladion and hired Highbridge Concierge, Inc. ("Highbridge"). Prior to the murders, Highbridge was unaware that Teixeira previously worked at the building or that he was involved in a confrontation with a resident.

The Concierge Services Agreement ("CSA") between the Trust and Highbridge included a "Statement of Work" that incorporated a Concierge Service Manual ("Manual") by reference. According to the Manual, the concierge's general responsibilities included: making daily rounds of building facilities, controlling access to the residential section of the building and other common areas, monitoring the cameras when possible, and attempting to resolve problems. The concierge's duties also included unlocking Elevator 1 in the morning and locking it in the afternoon at the designated times. The Manual also required concierges to report criminal activity.

In accordance with the CSA and Manual, Highbridge also employed "Runners" who assisted the concierge staff. The Runners were responsible for conducting driveway checks every hour and for conducting building tours (*i.e.*, rounds) between 5:00 p.m. and 7:00 p.m.

Over the years, the building experienced security issues with the garage and unauthorized access to the building, including a vehicle break-in in 2012 where the perpetrator entered the garage when a garage door was opened for contractors working at the building. After the incident, the president and sole owner of Bayberry, Christopher Mullen ("Mullen"), sent an e-mail to the concierge desk and Palladion informing them of the crime and directing the concierge to use extra caution about any suspicious persons entering the building. In 2014, another vehicle break-in occurred in the garage. This time, the perpetrator followed behind a resident who used a fob to

open a pedestrian door leading from the garage. Mullen also e-mailed the residents to alert them of this incident and remind them to be vigilant in preventing unauthorized access to the building.

In 2015, Mullen e-mailed the residents with the subject "Garage doors & Security precautions" to notify them that the garage doors would be kept open during the winter weather conditions that cause the doors to get stuck and that the P-1 elevator doors would be disabled other than during a delivery or move. The e-mail also notified the residents of the ongoing issue of teenagers loitering and damaging vehicles, including a resident's vehicle.

In August of 2016—just nine months before he was murdered—Dr. Richard Field expressed concerns about access to floor 11 to Mullen. Specifically, Dr. Field e-mailed Mullen with concerns about the stairwell door nearest his unit, Penthouse A, being unlocked to floor 11 and that several neighbors had knocked on his door to see if they could see the roof. He requested that handles be installed on the stairwell door to secure access to floor 11 like the doors to the roof. Mullen indicated that the building inspector from the City of Boston asked that these stairwell doors not be locked in any way. Dr. Field was surprised by the response and asked Mullen to get clarification on the door locks. Mullen did not recall inquiring further about what was permissible under the building code or looking into installing doors with electromagnetic sensors that would automatically unlock in the event of an alarm on floor 11 like elsewhere in the building.

On February 23, 2017, the Board of Trustees held a monthly meeting. The owners of Bayberry and Highbridge both attended. The meeting minutes reflect certain changes made by Highbridge, including an increased focus on garage security. The minutes also show that the Board discussed a need for a "security upgrade" with items to be priced and researched by Bayberry.

On May 5, 2017, at approximately 2:40 p.m., a Runner observed Teixeira walk past the lobby doors. A few minutes later, the same Runner observed Teixeira standing several feet from

the garage door as the Runner pulled a vehicle into the garage. At around 3:50 p.m., Teixeria followed another vehicle into the garage. Teixeria was briefly captured on camera facing the garage door before he entered. During those few seconds, the concierge was waving goodbye to individuals exiting the front lobby doors and the Runner was looking at his personal cell phone.

According to Teixeira's statement to Boston Police Detectives, after he gained access to the garage, he called Elevator 1, entered it, and waited for it to be called to a residential floor. From there, he made his way to floor 11 via the unlocked stairwell, the same stairwell that Dr. Field had expressed concerns over.

At approximately 5:00 p.m., Dr. Lina Bolanos entered the building through the main entrance and stopped by the concierge desk to pick up packages and mail before heading to floor 11. A little over an hour later, Dr. Field arrived in the lobby from the garage and then went to floor 11.

According to the Runner, at around 7:00 p.m., he conducted his building tour starting on floor 11, including checking the trash room a few feet from Dr. Bolanos and Dr. Field's penthouse unit. According to his testimony, he did not see any packages or mail in the hallway.

At 7:05, 7:09, 7:41 and 7:45 p.m., calls were placed to 911 from Dr. Field's cellphone. At 7:46 p.m., Dr. Field's cellphone sent texts to a friend pleading for help.

At 8:24 p.m., unable to reach Dr. Field and Dr. Bolanos, the friend called the concierge at the front desk and asked him to go up and check on them. The concierge did not go upstairs but tried to reach Dr. Field and Dr. Bolanos on their cellphones. When they did not answer, he called 911.

When Boston Police arrived at the building and went to floor 11, they found packages and a set of keys strewn along the hallway near the door to Penthouse A. When they accessed Penthouse A, they found Dr. Bolanos and Dr. Field dead inside and took Teixeira into custody after a struggle.

Teixeira was ultimately convicted of double murder on December 10, 2019.[2]

The estates of Dr. Bolanos and Dr. Field sued Highbridge, Bayberry and the Trust for wrongful death. In its twenty-two-page Order denying the Trust's motion for summary judgment on the wrongful death claim, the trial court held that, like a landlord, the Trust had a duty to protect persons on the building's common area from reasonably foreseeable criminal acts by third parties, including opportunistic crime.

The trial court noted that there was evidence that the Trust undertook to ensure the security of the building's common areas by entering into contracts with Bayberry and Highbridge, both of which had certain security responsibilities; monitoring security issues in and around the building; overseeing the maintenance of the building's security features, including cameras, key fobs, and garage door transponders; and, conducting condominium meetings on these topics.

The Court noted that these efforts were evidence that the Trust foresaw that intruders could gain access to the common areas to commit criminal acts and understood that the unit owners were relying on the Trust and its agents to protect them.

The trial court also noted that the type of criminal intrusion that occurred in this case was reasonably foreseeable to the Trust because it was aware of the possibility of unlawful intrusion into the garage when the garage doors were open, that criminal activity had resulted from such

[2] SUFFOLK CNTY DIST. ATTY, *Jury Convicts Defendants in 2017 Double Murder* (Dec. 10, 2019), https://www.suffolkdistrictattorney.com/press-releases/items/2019/12/12/jury-convicts-defendant-in-2017-double-murder.

intrusions in the past, and that once an intruder accessed the garage, the intruder could access the residential floors by waiting on a someone to call Elevator 1.

Finally, the court noted that Dr. Field put the Trust on notice of the lack of a locking mechanism on the stairwell doors that would permit access to floor 11 to harm residents and their property. Dr. Field reported a special vulnerability to the Trust that was eventually exploited by Teixeira.

The senseless killing of Dr. Field and Dr. Bolanos and the trial court's Order have brought renewed attention to an issue that associations and their legal counsel have struggled with for decades. *That is, do associations owe a duty to protect residents from third-party criminal acts?* In the *Field* case, the answer was clear: Yes.

In reaching its decision, the trial court in *Field* looked to the *Frances T.* case that occurred nearly four decades prior on the other side of the county.[3] In the *Francis T.* case (*supra* p. 15), the plaintiff, somewhat like Dr. Field, made repeated requests that the association improve the exterior lighting in the common area of her condominium development to deter crime. Her pleas were made after her unit was burglarized during a "crimewave" in the condominium. When the association ignored her requests, the plaintiff installed her own new lighting without the requisite approval from the association in accordance with the covenants. The association compelled her to remove the unauthorized lighting, which required her to turn off all her exterior lighting. Tragically, the plaintiff was subsequently raped and robbed in her unit. In its milestone decision, the Supreme Court of California held that the plaintiff stated a cause of action for negligence against the association and its individual directors. The Court noted that because the association maintained

[3] *See* discussion on *Francis T.* and standard of care in § 8.3.1.1 of Robert G. Natelson's Law of Property Owners Associations, ¶ 323 (1989).

and controlled the common area, it should be held to the same standard of care as a landlord with respect to third-party criminal acts.[4]

The trial court in *Field* also cited a similar decision in the *Martinez* case, in which a tenant's guest was shot in the condominium parking lot. (*Supra* pp. 14-15). The *Martinez* Court held that, with respect to the common area under its control, the association owed a duty like a landlord to maintain the property in a reasonably safe condition, which included the duty to take reasonable measures to protect against foreseeable activities creating danger on the land it controlled, including criminal attacks.[5]

The existence of a duty of care, foreseeability of third-party crime, the voluntary undertaking of security measures, and contractual obligations related to security coalesced in *Field*, leading to the trial court's decision that the condominium association, building management, and concierge service could be liable for the wrongful deaths of Dr. Field and Dr. Bolanos. Consequently, community associations and their counsel should take care to analyze each possible basis for liability for third-party crime.

IV. RECOMMENDATIONS.

With the perception of increasing crime nationwide and residents demanding a more active role in security from associations, what should community associations do to minimize liability?

[4] For further analysis of *Francis T.*, *see* Scott B. Hayward, *Francis T. v. Village Green Owners Association: Liability of Condominium Association and Board of Directors for Criminal Acts of Third Persons*, 19 Pac.L.J. 377 (1988), attached hereto as Appendix C.

[5] For further analysis of *Martinez*, *see* Irene S. Mazur, Condo Associations—New Cop on the Beat: Martinez v. Woodmar IV Condominiums Homeowners Association, 73 St. John's L. Rev. 325 (1999).

A. Don't Create a Duty.

First, associations should be mindful that their actions can create a duty where one may not have existed. For example, the installation of cameras creates the perception that the association is actively monitoring the cameras and protecting people from crime. Realistically, however, that is not the case.

If cameras are unmonitored, they are simply recording events that can be reviewed after-the-fact, not stopping crime. Moreover, even if the cameras are monitored, associations generally do not have the resources to provide continuous, 24/7 monitoring of the common area. The personnel tasked with monitoring the cameras take breaks, get distracted, perform other duties and otherwise miss events.

In addition to traditional cameras, many associations have also installed new license plate readers. Flock Safety is a rapidly growing nationwide "safety platform" that uses hardware, including License Plate Recognition, gunshot detection and video, together with machine learning to gather evidence in order to solve and deter crime. The company specifically targets community associations as customers. In fact, Flock Satiety's website has a page dedicated to board members.[6]

Flock Safety installs cameras that capture the make, vehicle-type, license plate, and unique features of vehicles, including damage and after-market alterations. This data is encrypted and transmitted to a secure cloud server. The data and footage are customer-owned.

If there is an incident, the association's designated administrator can pull the footage and share it with law enforcement. Additionally, associations can opt in to send real-time alerts to law enforcement.

[6] *See* https://www.flocksafety.com/industries/hoa-board-member.

Again, however, Flock Safety and similar technology creates the perception in the minds of the residents that the Association is actively protecting them from crime. Perhaps, associations should reconsider cameras and license plat readers.

Concierges and community patrols may also create the appearance that the association is actively keeping residents and their guests safe.

Once the duty is undertaken, the association must be non-negligent in discharging the duty. In its Order in the *Field* case, the trial court discussed in great detail the evidence that the Trust undertook to ensure the security of the common areas, and the failures that may contributed to the crimes.[7]

B. Watch Your Language!

Associations must also be careful to avoid using language like "security gates," security cameras" or "security guards." Instead, associations should use more appropriate terms like "access gates", "cameras" and "attendants" and "concierges." These terms are less likely to suggest that the association is providing security. Again, the issue is the perception created.

C. Take Requests and Feedback Seriously.

The *Francis T.* case remains a warning to all associations of the risks of denying a resident's request to install exterior lighting, cameras or other measures.

With the advent of Ring and Nest cameras, associations have experienced an increase in the number of requests to install doorbell cameras and other exterior cameras by residents. The exterior change typically requires architectural approval from the association. Thus, the association

[7] *Field* at ¶ 18.

must weigh the aesthetic and privacy considerations with potential liability if a camera is not permitted and the resident is subsequently the victim of a crime.

Moreover, in Utah, unit owners have a statutory right to install personal security cameras immediately adjacent to the entryway, window, or other outside entry point of the owner's condominium unit.[8]

D. Educate Owners and Residents.

If the association undertakes any measures that could be perceived as security features, such as the installation of cameras or license plate readers, written notice should be sent to all owners and residents explaining the purpose of the measures and warning them that the measures do not protect them from crime.

Associations should also post signs to make it clear that cameras and license plate readers are not being actively monitored, if that is the case.

E. Maintain and Repair the Common Area.

It is imperative that associations physically maintain and repair doors, gates, locks, and other features in the common area. Maintenance and repairs should be promptly initiated and diligently completed. If a feature is temporarily out of service, residents should be warned of the issue and written logs should be kept memorializing the remedial action taken by the association.

[8] Utah Code Ann. § 57-8-8.1(6)(a) (West): Except as provided in Subsection (6)(b), a rule may not prohibit a unit owner from installing a personal security camera immediately adjacent to the entryway, window, or other outside entry point of the owner's condominium unit. (b) A rule may prohibit a unit owner from installing a personal security camera in a common area not physically connected to the owner's unit.

Although the prompt remedial action taken by the association to repair the vehicle gate in *Villages of Cascade* did not prevent the crime from occurring, it protected the association from liability.

F. Amend Governing Documents to Add Exculpatory Clause.

Perhaps the most important step that associations can take to avoid liability is to amend the covenants to add an exculpatory clause.

As shown in the *Bradford Square* case, *supra*, these contractual provisions eliminate liability for future negligence, and are generally enforceable in the absence of willful or wanton conduct.

Examples of exculpatory clauses are provided in Appendix B.

G. Purchase Insurance.

Finally, associations should invest in quality insurance coverage, including commercial general liability and directors and officers' policies. There is simply no alternative to the advice and assistance of a knowledgeable and experienced community association insurance professional.

Appendix A

Memorandum of Decision and Order on Defendant's Motions for Summary Judgment (papers 38 and 41) in Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al, in the Superior Court of the Commonwealth of Massachusetts, Docket No. 1784CV02486-B

NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO. 1784CV02486-B

NOTICE SENT (5)
07.05.22
(AT)

JASON FIELD, as personal representative, and GLORIA AMANDA GIBBS, as personal representative,

Plaintiffs

vs.

HIGHBRIDGE CONCIERGE, INC., BAYBERRY MANAGEMENT, LLC, and COURT SQUARE PRESS BUILDING CONDOMINIUM TRUST,

Defendants

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Papers 38 and 41)

This civil action arises from the vicious killing on May 5, 2017, of Dr. Richard Field and Dr. Lina Bolanos by the convicted murderer Bampumim Teixeira (Teixeira). The murders occurred in the victims' home, a penthouse unit on the eleventh floor of the Macallen Building (Building) in South Boston. At the time of the murders, defendant Bayberry Management, LLC (Bayberry) managed the Building, and defendant Highbridge Concierge, Inc. (Highbridge) provided concierge services for the Building. Defendant Court Square Press Building Condominium Trust (the Trust) is the condominium association for the Building and its sister building, the Court Square Press, also in South Boston.

Plaintiff personal representatives of the victims' respective estates allege Teixeira was able to enter the Building, invade their loved ones' home, and commit the murders because of the negligence of Bayberry, Highbridge, and the Trust. The matter is before the court on summary judgment motions brought by Highbridge and the Trust (Paper 38), and Bayberry (Paper 41),

based on their respective theories of lack of duty as a matter of law. Following hearing on April 27, 2022, and thorough review of the pleadings and applicable authority, the motions are **ALLOWED** in part, and **DENIED** in part.

For the reasons explained below, judgment is ALLOWED and shall enter in favor of the respective Defendants on the common law negligence claims, Counts VI, IX and XII. Summary judgment is DENIED on Counts IV, V, VII, VIII, X, and XI, the wrongful death claims.[1]

Undisputed Background Facts

The Macallen Building

The Building is an 11-story, 144-unit condominium complex located at 141 Dorchester Avenue, South Boston, Massachusetts, near the Broadway MBTA stop. Consolidated Statement of Material Facts in Support of Defendants' Motions for Summary Judgment (Facts) 1, 3, 5. The Building features a three-level parking garage, accessed by vehicles via a garage door that is opened through the use of a personally programed transponder. Facts 4. The top floor of the Building consists of two penthouse units, Penthouse A and Penthouse B. Facts 31; Joint Appendix Ex. 1 at 12. Drs. Field and Bolanos lived in Penthouse A, which Dr. Field bought in 2013 for $1,945,000. Facts 16, 31.

In 2017, the Building required a fob to open the lobby's entry doors. Joint Appendix Ex. 1 at 245. In the absence of a fob, a person could be buzzed in by a concierge at the concierge desk, which was immediately to the right of the entry doors upon entering the main lobby. Joint Appendix Ex. 1 at 245, Ex. 28 at 12. The concierge desk was equipped with a computer screen on which the feeds of the building's 14 closed-circuit television (CCTV) cameras were viewable.

[1] Counts I-III, previously pleaded against Palladion Services, LLC the former concierge service for the Building, were dismissed pursuant to stipulation on May 22, 2020. Docket, Paper 24.

Facts 51. Camera locations included the entrance to the garage, the lobby, the driveway, and various angles of Dorchester Avenue. Joint Appendix Ex. 14 at 42. Only one of the Building's cameras was located inside the garage, and it was pointed towards the two vehicle garage doors. Joint Appendix Ex. 14 at 42-43; Ex. 24.

Further into the lobby beyond the concierge desk on the left are two elevators. Joint Appendix Ex. 28 at 1, Ex. 21 at 86. During the morning beginning at 6:00 a.m. and until 4:00 p.m., Elevator 1, the service elevator, could be accessed from the main lobby, as well as via its rear door, which opens into level P-1 of the Building's garage. Joint Appendix Ex. 21 at 86-89, Ex. 28 at 53-55, Ex. 14 at 34-35. In 2017, anyone could enter the service elevator from P-1 between those hours, but a fob was required to send the service elevator to a residential floor. Joint Appendix Ex. 21 at 88-89, Ex. 28 at 54-55. A fob could be used to access all residential floors but for Floor 11; only residents on Floor 11 where Dr. Field and Dr. Bolanos lived could use a fob to send an elevator to Floor 11. Joint Appendix Ex. 1 at 126. However, a person without a fob could gain access to any floor, including Floor 11, by: waiting inside the elevator for it to be summoned by someone else on a residential floor; exiting the elevator on that floor; and then using one of two internal, unlocked stairwells to access other floors. Highbridge was aware of these circumstances. Joint Appendix Ex. 21 at 90, Ex. 28 at 24-25, Ex. 1 at 52, and Ex. 30 at 51.

Elevator 1 was locked on the P-1 side after 4:00 p.m. until 6:00 a.m. the next morning, as well as whenever the vehicle garage doors were malfunctioning and left in the open position. Joint Appendix Ex. 1 at 65-69, 250, Ex. 14 at 34. This management of Elevator 1 was established to limit access to the Building from the garage. Joint Appendix Ex. 1 at 72-75, 250.

Building Management and Concierge Services

In 2012, the Trust hired Bayberry, a property management firm, to manage the Building and its sister building, the Court Square Press Building. Facts 11, 30. Bayberry maintains an office at the premises. Facts 12. Section 4 of the Court Square Press Building Condominium Management Agreement (Management Agreement) provides:

> **Powers and Duties of Manager.** The Manager shall be authorized and required to perform all services necessary for the management of the Property, including but not limited to:
>
> ...
>
> **(E) Utilities, Repairs and Maintenance.** [Provide for utilities to be supplied to the Condominium and cause the common areas and facilities of the Condominium to be maintained and repaired in accordance with the standards established by the Trustees pursuant to the By-Laws at the expense of the Trust. The same shall include entering into contracts in the name of the Trust (and monitoring the proper performance under such contracts) for . . . *security services.*

Joint Appendix 51 (bold in original, italics supplied). Christopher Mullen, the president and sole owner of Bayberry, testified he had satisfied the obligation to enter into a security contract by entering into concierge agreements, which involved "certain security aspects" and provided security services "[i]n some way." He also acknowledged that "the 24/7 concierge was a safety and security measure." Joint Appendix Ex. 1 at 28, 34.

From April, 2007 through February, 2017, Palladion Services, LLC (Palladion) provided concierge services at the Building and Court Square Press Building. Facts 33. In or about October 2015, Palladion hired Teixeira as a concierge employee. Facts 34. While working as a concierge at the Building, Teixeira gained knowledge of where the CCTV cameras and stairwells were positioned, as well as how the elevators and the garage operated. Facts 35. In April 2016, following a confrontation with a resident, Teixeira quit his job at the Building. Facts 36.

In February 2017, the Trust terminated its concierge services contract with Palladion, and hired Highbridge. Facts 37, 39. Prior to the murders, Highbridge was unaware that Teixeira had previously worked at the Macallen Building, or that he had been involved in an altercation with a building resident. Facts 67. Highbridge was also unaware of Teixeira's criminal history or background. Id.

The Concierge Services Agreement (CSA) under which Highbridge operated included a "Statement of Work" that referenced and incorporated into the Agreement a Concierge Service Manual. Facts 39. The Manual provides that: "The concierge position exists to assist in the common functionality of the building. The services of the concierge include: **access control**, vendor management, package and delivery acceptance and retrieval, emergency response, policy enforcement, and resident services. . . . Highbridge . . . **is not an insurer of the building's security, safety or general exposures.**" Joint Appendix Ex. 14 at 6 (emphasis supplied). The Manual further provides that a concierge's general responsibilities include: "[m]ak[ing] daily rounds of building facilities (if required by your position)"; [c]ontrol[ing] access to the residential section of the building and other common areas"; and "[m]onitor[ing] CCTV when possible, and attempt[ing] to resolve problems." Joint Appendix Ex. 14 at 33-34. Neither the CSA nor the Manual obligated Highbridge to ensure that any particular CCTV camera feed was displayed on the CCTV monitor at the concierge desk. Facts 52.

Highbridge's duties also included unlocking Elevator 1 at 6:00 a.m. in the morning and locking it at 4:00 p.m. Joint Appendix Ex. 14 at 34-35. Lastly, the Manual provides: "In your position as concierge you may either become aware of, or be notified of, criminal activity. Just remember, when in doubt, report it." Joint Appendix Ex. 14 at 8.

Pursuant to the CSA and the Manual, Highbridge also employed "Runners," shared between the Building and the Court Square Press Building, who assisted the concierge staff at the buildings' front desks during day and evening shifts. Facts 53. Among other duties, Runners were responsible for conducting driveway checks every hour, and for conducting building tours between 5:00 p.m. and 7:00 p.m. Facts 54. See also Joint Appendix Ex. 14 at 38.

Macallen Building Garage Security Issues

Over the years, the Building experienced a variety of security issues with the garage.

In December 2012, a car in the garage had its convertible top cut open, in an apparently failed attempt to get into the car. Joint Appendix Ex. 45. The perpetrator entered the garage when one of the garage's two doors was opened for contractors working at the Building. Joint Appendix Ex. 1 at 43-45. Mullen sent an email to the concierge desk and Palladion, informing them of the incident and directing the concierge to "please use extra caution from this point moving forward about any suspicious persons entering either building." Joint Appendix Ex. 45.

In October 2014, another vehicle break-in took place in the Building garage. Joint Appendix Ex. 46. The perpetrator entered the garage by piggybacking behind a resident who used a fob to open a pedestrian door leading from the P-2 level of the garage. Joint Appendix Ex. 1 at 56-60. Following this incident, Mullen sent an email to all residents in which he wrote:

> [A] vehicle in the Macallen garage was broken into on Friday October 24th, at approximately 5 PM. . . . Although nothing was stolen from the vehicle, a window was broken.
>
> Residents should be aware that there have been multiple car break ins throughout South Boston recently. The recent incident in the garage is the second attempted theft in the Macallen garage over the past two years. It is believed the suspect in this case 'piggybacked' a resident with key access to the building.
>
> It is important that all residents be vigilant in preventing unauthorized access to the garage or building. Please,

> Do not let anyone in (even if they say they are here as a "guest") without the presence of the Concierge.
>
> Do not leave access doors ajar.
>
> If you find a garage door open (or other door being left open) immediately notify the Concierge.
>
> If you see someone looking or acting in a suspicious manner, immediately notify the Concierge and/or contact the South Boston police 911.

Joint Appendix Ex. 46.

In February 2015, winter weather conditions were causing the garage doors to get stuck. Joint Appendix Ex. 1 at 66. Mullen sent an email to all residents with the subject "Garage doors & Security precautions" in which he wrote:

> To avoid costly damage to the doors, I have notified staff to keep the doors open until we have consistent weather improvement. Security is very important to all, so the P-1 level [elevator] doors inside and out will be disabled other than when a delivery and or move is being performed.
>
> Over the past few months there have been Teenagers "hanging out" under the Broadway Bridge on Foundry St. and have damaged cars one being a residents [sic]. The Police are aware of this and have told me they are doing extra passes, but the colder temps have kept them from showing up. If you do see them (usually 4 or 6 of them) in the future, please simply put a call into Boston Police ... and let the Concierge on duty know, as well.

Joint Appendix Ex. 48.

On February 23, 2017, soon after Highbridge took over for Palladion, the Trust's Board of Trustees held a monthly meeting attended by Mullen. Joint Appendix 52 at 1. Patrick Knight, the president and owner of Highbridge, also attended a portion of the meeting. Joint Appendix Ex. 21 at 149, 151-152, Ex. 52 at page 5. The minutes reflect certain "changes made" by Highbridge, including an "increased focus on garage security (especially in cold weather when the doors act up)." Joint Appendix Ex. 52 at page 5 (emphasis removed). At the meeting, the

Board discussed the need for a "security upgrade" and items to be priced/researched in connection with this upgrade by Bayberry. Joint Appendix Ex. 52 at pages 5-6.

Dr. Field's Complaint to Bayberry About Floor 11 Access

Pursuant to the Management Agreement, Bayberry was tasked with "[a]ttend[ing] to the reasonable complaints of Unit Owners, with respect to the operation of the common areas and facilities of the Condominium" and providing monthly reports of such complaints and their dispositions to the Trust. Joint Appendix Ex. 51 at § 4(L). In August 2016, nine months before the murders, Dr. Field and Mullen engaged in an email exchange, which reflects the following back and forth between the two:

> Dr. Field: "I remember the other thing I wanted to talk about. its [sic] the stair case [sic] nearest my door. We have had several neighbours [sic] walk in and knock on my door as well as a few that came up to see if they could see the roof. There is no handle on the door so they can walk right in. I understood the top floor was supposed to be secured. Can you put the one way handles on the door the same as on the roof?"
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> Mullen: "In regards to people knocking on your door, I am shocked that people would do that[.] The egressed stairwells are unlocked, but the elevator access is not. During inspection I do know the building inspector from the city of Boston asked that the doors not be locked in anyway [sic]."
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> Dr. Field: "We were sort of shocked of [sic] too by the knocks on the doors which prompted me to check where they got in.[] Can we get clarification from somewhere on the door locks. It would seem reasonable that the hallway must be able to access the stairway in event of a fire but not the other way round. If so[,] then the doors to the roof could not have passed inspection."
>
> Mullen: "Richard by the way did you catch [the] names of these people? It's pretty clear and understood that the 11th floor is locked off from others."
>
> Dr. Field: "I did but I don't want to make an issue of the individuals I wanted to make sure the top floor was secure. I understand the fire dept would have an issue with fob access but it confuses me as to why they would take issue with one way access to stairwells. These seems [sic] a common mode of security in other buildings."
>
> Mullen: "As you can imagine building code is interpreted several different ways is a conflict (sic) between the fire department in the building department although they do work simultaneously to agree on use and occupancy. It would be the way the code is written in interpreted the day of inspection that is the only sensible reason. It get hundreds of pages of updated code or [sic] year to adjust my Massachusetts state code book.

Joint Appendix Ex. 47.

Mullen does not recall inquiring further about what was permissible under the building code or looking into whether it would be possible to outfit the Floor 11 doors with electromagnetic sensors that release access to the doors in the event of an alarm. Joint Appendix Ex. 1 at 136, 139, 140. Mullen acknowledges there were "cage doors" in one stairwell between the P-3 level and the residential floors equipped with an electromagnetic release that would automatically unlock in the event of a fire alarm. Joint Appendix Ex. 1 at 118-120. After these murders, locks were installed on Floor 11 stairwell doors. Joint Appendix Ex. 32 at 34-37.

The Murders of Dr. Richard Field and Dr. Lina Bolanos

On May 5, 2017, at or about 2:40 p.m., Teixeira walked past the lobby doors of the Building for approximately six (6) seconds, where he was observed by Highbridge Runner Corey Raji. Facts 57. A few minutes later, Teixeira was standing within several feet of the garage door, as Runner Raji pulled his vehicle into the garage. Joint Appendix Ex. 25 at 57-59, Ex. 55.[2] At or about 3:50 p.m., Teixeira gained entry into the Building's garage behind a different vehicle entering the garage. Facts 59. Teixeira was captured by a CCTV camera facing the garage door for approximately fifteen (15) seconds before he entered. Facts 60. At the moment Teixeira entered the garage, neither the concierge on duty at the Concierge Desk, Zuruf Tongo, nor Runner Raji, who was now sitting next to Tongo, observed Teixeira on the CCTV monitor. Facts 62. In those seconds, Tongo was waving goodbye to individuals leaving the front lobby doors, and Raji was looking at his personal cell phone beneath the concierge desk. Facts 62. It

[2] Raji testified in his deposition that he did not remember seeing anyone near the garage. Joint Appendix Ex. 25 at 59. However, at Teixeira's criminal trial, Raji testified he saw Teixeira "at the back of the building by the garage entrance" when "I was putting my car into the parking spot." Joint Appendix Ex. 54 at 8-109.

is unknown which camera feeds were viewable on the CCTV monitor at the moment Teixeira entered the garage. Facts 63.

According to Teixeira's statement to Boston Police Detectives the day after the murders, once he made his way into the garage, he summoned Elevator 1, entered it, and waited for it to be called to a residential floor. From there, he made his way to Floor 11 via the stairwell. Joint Appendix Ex. 53 at 49-51, 66-67, 71-73.[3]

A little before 5:00 p.m., Dr. Bolanos entered the building through the main entrance and stopped at the concierge desk to pick up packages and her mail before making her way to Floor 11. Joint Appendix Ex. 33 at 73-74. More than an hour later, Dr. Field entered the lobby via the garage entrance, and made his way to Floor 11. Joint Appendix Ex. 33 at 74-75.

According to Raji, around 7:00 p.m. he conducted his building tour, starting on Floor 11 and checked the floor's trash room, which was only a few feet from the door to Penthouse A. Raji testified that he did not see any packages or keys strewn on the floor of the hallway outside Penthouse A. Joint Appendix Ex. 25 at 80-86.

At 7:05, 7:09, 7:41 and 7:45 p.m., various calls were placed to 911 by Dr. Field's cellphone. Joint Appendix Ex. 69. The call at 7:41 lasted approximately 3 minutes, and according to the plaintiffs, Dr. Bolanos could be heard faintly begging for help. Joint Appendix Exs. 69, 70. Thereafter, at 7:46 p.m., Dr. Field's cellphone sent texts to a friend pleading for help. Joint Appendix Ex. 41.

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[3] Defendants have moved to strike Exhibit 53 from the summary judgment record, contending Teixeira's statement to police is inadmissible. Paper 51. That motion is **DENIED at this time, without prejudice to any rulings by the trial judge**. Portions of the statement in Exhibit 53 will likely be admissible as statements against penal interest. Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 574-575 (2008); Mass. Guide to Evidence (2022), Section 804(b)(3), pages 355-357, and cases cited. Moreover, even if Exhibit 53 were stricken in its entirety, the other circumstantial Record evidence described here permits a reasonable inference for purposes of summary judgment that Teixeira accessed Floor 11 in the manner described.

At 8:24 p.m., unable to reach either Dr. Field or Dr. Bolanos on their cellphones, the friend called the concierge desk and asked Tongo to go up to Penthouse A to check on Dr. Field and Dr. Bolanos. Joint Appendix Ex. 31 at 44-45, 47-48, Ex. 33. at 70-72. Tongo did not go up to Penthouse A, but instead called the cellphones of Dr. Field and Dr. Bolanos. He received no answer. Joint Appendix Ex. 33 at 81-82. At 8:33 p.m., Tongo, called 911. Joint Appendix Ex. 33 at 87.

Boston Police immediately arrived at the building and made their way to Floor 11. Joint Appendix Ex. 33 at 89-90. Officers testified that there were packages and a set of keys strewn along the hallway near the door to Penthouse A. Joint Appendix Ex. 34 at 41-43, Ex. 19 at 54-55. Using the keys in the hallway, the police accessed Penthouse A. Joint Appendix Ex. 34 at 43-45, Ex. 19 at 54. Dr. Field and Dr. Bolanos were found dead inside; Teixeira was found alive inside and taken into custody after a struggle.

Discussion[4]

Plaintiffs bring claims for wrongful death, conscious pain and suffering, and negligence against Highbridge (Counts IV-VI), Bayberry (Counts VII-IX), and the Trust (Counts X-XII). As explained below, although the Defendants are entitled to summary judgment on the negligence claims, the wrongful death counts and conscious pain and suffering counts survive.

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[4] There is no dispute about the standard of review. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Helfman v. Northeastern Univ., 485 Mass. 308, 314 (2020), quoting Godfrey v. Globe Newspaper Co., 457 Mass. 113, 118-119 (2010). The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue. Scholz v. Delp, 473 Mass. 242, 249 (2015). Record evidence and all reasonable inferences drawn therefrom are construed in favor of the party opposing the motion. Borden Chem., Inc. v. Jahn Foundry Corp., 64 Mass. App. Ct. 638, 645 (2005). However, "[b]are assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment." Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp., 469 Mass. 800, 804 (2014). The court considers admissible record evidence as presented by any pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, but does not weigh evidence, assess credibility, or find its own facts. O'Connor v. Redstone, 452 Mass. 537, 550-551 (2008).

Negligence and Conscious Pain and Suffering Claims

Highbridge argues that the plaintiffs' common law claims for conscious pain and suffering and negligence must be dismissed, because the Wrongful Death Statute, G. L. c. 229, § 2, provides the exclusive cause of action for the recovery of damages. Although only Highbridge makes this argument, it applies to all three Defendants.

I agree the three negligence counts should be dismissed, because G. L. c. 229 provides the exclusive (and comprehensive) remedy for damages relating to wrongful death. Hallett v. Wrentham, 398 Mass. 550, 555 (1986)("The wrongful death statute provides for a single action brought by the decedent's executor or administrator. The executor or administrator presents all claims by the designated beneficiaries for damages flowing from the wrongful death."). The wrongful death counts allege both that the defendants' negligence resulted in the murders of Dr. Bolanos and Dr. Field, Complaint, para. 53, and that the same negligence resulted in Dr. Bolanos' and Dr. Field's kidnapping and mental and physical terrorization. Complaint, para. 56. Both forms of harm seek to recover for what I am persuaded was the unitary event of Teixeira's violent home invasion, which event included the forms of conscious pain and suffering to the victims alleged in the Complaint, in addition to their death.

The parties are correct that Section 6 of G.L. c. 229 permits the recovery of a victim's conscious pain and suffering damages in an action for wrongful death, so those claims survive as a statutory matter, if other elements are ruled met. Opposition to Highbridge's Motion, Paper 39, at 25. All forms of suffering by the victims are distinct from the suffering of their statutory next of kin, for the consortium-like loss of loved ones. The suffering of next of kin is addressed by a separate provision of the statute. G.L. c. 229 section 2 (1973); Laramie v. Philip Morris USA,

Inc., 488 Mass. 399, 406, and note 7 (2021)("compensatory damages are based on the 'fair monetary value of the decedent to the persons entitled to receive the damages recovered'").[5]

The Motions are therefore ALLOWED on Counts VI, IX, and XII, as unnecessarily duplicative of the wrongful death claims.

Wrongful Death Claims

As stated, the Wrongful Death Statute permits a claim for negligence that causes the death of a person. To prove negligence, a plaintiff must establish that: the defendant owed the plaintiff a duty of reasonable care; the defendant breached that duty; harm resulted; and there was a causal relation between the breach and the harm. Jupin v. Kask, 447 Mass. 141, 146 (2006). The existence of a duty is a question of law for the court which may be decided on summary judgment. Id. All three Defendants argue they are entitled to summary judgment because they owed no duty to Dr. Bolanos and Dr. Field. I conclude otherwise.[6]

Duty of Care

A tort duty of care can arise in one of three ways. First, it can arise from "existing social values and customs." Mullins v. Pine Manor Coll., 389 Mass. 47, 51 (1983)(internal quotations omitted). "[T]he courts will find a duty where, in general, reasonable persons would recognize it

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[5] The potential availability of statutory punitive damages under section 2 is beyond dispute, if gross negligence and/or recklessness is properly pleaded in a wrongful death case, and proven at trial. Laramie, 488 Mass. at 406.

[6] Defendants have moved to strike Exhibits 23, 35, 36 and 28 from the summary judgment Record. Paper 51. These Exhibits are expert reports proffering opinions about, among other things, a proposed basis for duty. Defendants are quite correct that legal conclusions are not the stuff of expert witness testimony. Nor is duty a question of fact for an expert at this stage of the case. Because I rule Plaintiffs establish duty on other bases, I do not rely on any of the reports for these Rulings. The Motion to Strike is **DENIED without prejudice** to consideration by a subsequent motion or trial judge of substantive Daubert/Lanigan challenges to any proffered expert opinions or portions thereof.

and agree that it exists." Luoni v. Berube, 431 Mass. 729, 735 (2000), quoting W.L. Prosser & W.P. Keeton, Torts § 53, at 358–359 (5th ed. 1984). Jupin, 447 Mass. at 146-147.

The second way a duty can arise is through voluntary assumption. Mullins, 389 Mass. at 52 ("It is an established principle that a duty voluntarily assumed must be performed with due care."); Holloway v. Madison Trinity Ltd. Partnership, 95 Mass. App. Ct. 628, 632 (2019). "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Mullins, 389 Mass. at 53, quoting Restatement (Second) of Torts § 323 (1965).

Lastly, a duty can arise pursuant to contract. LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 328 (2012)("It is settled that a claim in tort may arise from a contractual relationship, . . . and may be available to persons who are not parties to the contract . . . who are foreseeably exposed to danger and injured as a result of . . . negligent failure to carry out that obligation.") (internal quotations, and citations, omitted). Whether a duty arises under any of these circumstances largely depends on the reasonable recognizability or foreseeability by the defendant of the alleged harm to the plaintiff. Jupin, 447 Mass. at 147; Heath-Latson v. Styller, 487 Mass. 581, 584 (2021)("Fundamentally, the existence of a duty of care depends upon the foreseeability of a risk of harm that the defendant has an ability to prevent."); LeBlanc, 463 Mass. at 328; Whittaker v. Saraceno, 418 Mass. 196, 198 (1994)(commercial landlord may well have a duty of care to guard against foreseeable criminal acts of third parties); Foley v. Boston Housing Auth., 407 Mass. 640, 644 (1990)(no duty in employer-employee relationship).

Generally, no duty exists to protect others from criminal activities of third persons. Jupin, 447 Mass. at 148. However, such a duty may arise if the putative defendant "realizes or should realize that [their act or omission] involves an unreasonable risk of harm to another through" criminal conduct. Id., quoting Restatement (Second) of Torts § 302B (1965). Stated differently, third-party criminal conduct will be viewed as foreseeable if the defendant recognized or should have recognized that their conduct likely created a situation that afforded an opportunity to a third person to commit a crime. Id., quoting Restatement (Second) of Torts § 448 (1965).

"[T]he standard of foreseeability turns on an examination of all the circumstances." Mullins, 389 Mass. at 56. A plaintiff may establish foreseeability with evidence of prior similar criminal acts by a third party, but evidence of such acts is not required; prior criminal conduct is but one factor to consider in the analysis. Id. See also Whittaker, 418 Mass. at 199 ("The previous occurrence of similar criminal acts on or near a defendant's premises is a circumstance to consider, but the foreseeability question is not conclusively answered in favor of a defendant landlord if there has been no prior similar criminal act.").

With these general principles in mind, the court analyzes the potential duty of each Defendant.

The Trust

Ownership of a condominium unit is a hybrid form of real estate interest; the owner has both exclusive ownership and possession of his unit and an undivided interest, shared with the other unit owners, in the common areas. Noble v. Murphy, 34 Mass. App. Ct. 452, 455–456 (1993). Such ownership "affords an opportunity to combine the legal benefits of fee simple ownership with the economic advantages of joint acquisition and operation of various amenities

including recreational facilities, contracted caretaking, and **security safeguards.**" Id. (emphasis added). Busalacchi v. McCabe, 71 Mass. App. Ct. 493, 499 (2008)("Though it borrows from both individual and common forms of ownership, condominium ownership differs from both.").

Pursuant to the condominium statute, the maintenance of such "amenities" in common areas is the responsibility of the condominium association. See G. L.c. 183A, § 10(k)(requiring that "[t]he organization of unit owners ... designate a person or entity ... [to] oversee the maintenance and repair of the common areas of the condominium."); Feinstein v. Beers, 60 Mass. App. Ct. 908, 909 (2004)(rescript)("condominium association controls the common areas"). For many condominium associations, as is the case here, the responsibility to oversee the common areas is met through the employment of a professional property management firm.

The parties have not cited, and the court has not found, a Massachusetts appellate decision addressing the duty of care, if any, owed by a condominium association to protect unit owners against the criminal acts of third parties carried out through common areas. To the limited extent our own appellate courts have addressed duty in the condominium context, they have distinguished between criminal incidents implicating a public or common area of the building, and those implicating private areas over which a unit owner had control, because condominium associations do not assume exclusive responsibility for privately-owned units. Feinstein, 60 Mass. App. Ct. at 908-909 (leaving unit balcony door partially open was an obvious danger, relieving trust of duty to warn; trust did not create situation that caused the danger); Hawkins v. Jamaicaway Place Condo. Tr., 409 Mass. 1005, 1005 (1991)(rescript) (individual unit owner's failure to install security bars on his windows at his own expense supported summary judgment for the trust).[7]

[7] See also, O'Brien v. Christensen, 422 Mass. 281, 283, 286-287 (1996)(trust responsible for the proper maintenance and repair of the common elements pursuant to condominium master deed).

The Supreme Courts of California and Arizona have each addressed the duty of care of condominium associations, and concluded that they should be held to the same standard of care for common areas as a landlord. Like a landlord, a condominium association bears a duty to exercise due care for the residents' safety in those areas under the association's control, i.e., the common areas. Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc., 941 P.2d 218, 189 Ariz. 206, 209 (1997)(shooting in parking lot before condominium security guard came on duty; noting that "a new type of possessor . . . the condominium association . . . [l]ike a landlord who maintains control and liability for conditions in common areas, . . . controls all aspects of maintenance and security for the common areas and, most likely, forbids individual unit owners from taking on these chores"); Frances T. v. Village Green Owners Assn., 723 P.2d 573, 42 Cal. 3d 490, 499-503 (1986)(no exterior lighting in common area controlled by association outside unit; rape and robbery of unit owner inside unit; association held to same standard as landlord to exercise due care; "not necessary [for foreseeability] . . . that the prior crimes be identical to the ones perpetrated against the plaintiff")(emphasis in original).

I am persuaded by the reasoning of these decisions. In each case, the defendants raised the arguments raised here. But the existence of opportunistic crime, including violent crime, accessed through public areas is a foreseeable fact of everyday life for most citizens, and condominium complexes are no exception. I accordingly believe that recognizing this duty is consistent with current Massachusetts law, as well as the teaching of Mullins regarding "existing social values and customs." 389 Mass. at 51. Heath-Latson, 487 Mass. at 584-585 ("There are exceptions to this [no duty] rule."); Whittaker, 418 Mass. at 198-199 ("All of the circumstances are examined in defining the scope of a duty of care based on the reasonable foreseeability of harm."); Or v. Edwards, 62 Mass. App. Ct. 475, 484-485 (2004)(duty of residential landlord).

In Massachusetts, our Supreme Judicial Court has explained: "A landlord 'is not a guarantor of the safety of persons in a building's common area. A landlord is not free, however, to ignore reasonably foreseeable risks of harm to tenants, and others lawfully on the premises, that could result from unlawful intrusions into common areas of the leased premises.'" Griffiths v. Campbell, 425 Mass. 31, 34 (1997), quoting Whittaker, 418 Mass. at 197; Or, 62 Mass. App. Ct. at 484 ("landlord of residential property ... was under a duty – higher than that of a commercial landlord – to protect tenants from reasonably foreseeable risks of harm, including foreseeable risks of criminal acts")(citation and footnote omitted). Thus, whether the Trust owed a duty to Dr. Bolanos and Dr. Field turns on whether Teixeira's intrusion into the building in the manner he accomplished it,[8] and the harm that resulted, was foreseeable. **I conclude for summary judgment purposes on this Record that it was.** Jupin, 447 Mass. at 147-148, n. 7 ("[I]insofar as foreseeability bears on the existence of a duty, it is not appropriate to leave such an issue to the jury. . . . [T]he issue of foreseeability insofar as it affects the causal relationship between the defendant's breach of a duty and the victim's injuries is for the jury to decide.").

There is evidence that the Trust undertook to ensure the security of the Building's common areas, by: entering into contracts with Bayberry and Highbridge, both of which were entrusted with certain security responsibilities;[9] monitoring security issues and overseeing the maintenance of the building's security features (e.g., CCTV cameras, key fobs, and garage door transponders); and conducting condominium meetings on these topics.[10] By way of just one example, at their February 23, 2017 meeting, the Board of Trustees discussed the need for a security system upgrade (e.g., replacing the exterior cameras at Macallen). All these efforts

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[8] I do not agree with the Trust' argument that the Record evidence on this point is unduly speculative. Paper 42, at page 17 and n. 6.

[9] Bayberry's and Highbridge's security responsibilities are discussed below.

[10] As noted above, the Trust's duty with regard to common areas is established by statute.

would make little sense unless the Trust foresaw that uninvited and unauthorized intruders could gain access through the common areas of the Building to commit criminal acts, and understood the unit owners were relying on the Trust and its agents to attempt to protect them against such acts.

There is also evidence that the type of criminal intrusion that occurred here was reasonably foreseeable to the Trust. The Trust, primarily through Bayberry, was well aware that unlawful intrusion into the garage was possible when the garage doors were opened, that such intrusions had resulted in criminal activity in the past, and that once an intruder accessed the garage, he could access residential floors by waiting for a resident to call Elevator 1. Additionally, the Trust possessed very specific notice from Dr. Field that he was concerned about the lack of a locking mechanism on the stairwell doors. Dr. Field expressed his belief that the absence of a lock could permit unlawful intruders to access Floor 11, and cause harm to residents or their property. Defendants characterize this exchange as merely reflecting Dr. Field's concern that certain neighbors already lawfully within the residential portions of the Building were entering Floor 11. Trust and Bayberry Reply, Paper 44, at 7. However, Dr. Field's specific language may reasonably be interpreted otherwise. Joint Appendix 47 ("I don't want to make an issue of the individuals [who were his neighbors] I want[] to make sure the top floor [is] secure.").

For purposes of the summary judgment Record before me, I conclude that it was reasonably foreseeable to the Trust that an intruder could enter the garage, access Floor 11 as described and acknowledged possible, and then harm residents. The fact that no other armed home invasion or murder had occurred at the premises before May 5, 2017 cannot detract at this

stage of the case from all of the other circumstantial evidentiary factors pointing to a duty based on foreseeability, whether that duty is found in common law or contract.

The Trust's motion for summary judgment on Counts X and XI (wrongful death against the Trust) is DENIED.

Bayberry

Through its Management Agreement with the Trust, Bayberry assumed the Trust's duty to protect the condominium's common areas from intruders. Section 4 of these parties' Agreement specifically provides:

> The Manager shall be authorized *and required* to perform all services necessary for the management of the Property, including: but not limited to:
>
> ...
>
> **(E) Utilities, Repairs and maintenance.** []Provide for utilities to be supplied to the Condominium and cause the common areas and facilities of the Condominium to be maintained and repaired in accordance with the standards established by the Trustees pursuant to the By-Laws at the expense of the Trust. The same shall include entering into contracts in the name of the Trust (and monitoring the proper performance under such contracts) for . . . *security services*.

Joint Appendix 51 (bold in original, italics supplied).

This duty by Bayberry to protect the common areas from intruders pursuant to the Management Agreement is supported by: Mullen's testimony that he satisfied the obligation to enter into a security contract by entering into concierge agreements, which involved "certain security aspects," and provided security services "[i]n some way," and that "the 24/7 concierge was a safety and security measure," Joint Appendix Ex. 1 at 28 and 34; the emails between Dr. Field and Mullen regarding Floor 11 access, which indicate both that Dr. Field relied upon Bayberry, as agent of the Trust, to protect residents from intruders gaining access to common areas, and that Floor 11 was intended to be subject to additional security protections; the emails indicating Bayberry took charge when security issues in the building arose, particularly with

regard to the garage; and the Board of Trustees meeting minutes indicating Bayberry's participation in the Trust's efforts to upgrade the building's security system.

To the extent Bayberry argues the murders were unforeseeable, and therefore there was no duty, I rule otherwise for the same reasons discussed above in connection with the Trust.

Bayberry's motion for summary judgment on Counts VII and VIII (wrongful death) is accordingly DENIED.

Highbridge

I rule that, for purposes of summary judgment, Highbridge also assumed a duty to protect the common areas from intruders.

This duty begins with the plain meaning of "access control," contained in the CSA at 6, and the methods by which that control was to be maintained. The Concierge Service Manual incorporated into the CSA required Highbridge to: "[m]ake daily rounds of building facilities"; [c]ontrol access to the residential section of the building and other common areas"; and "[m]onitor CCTV when possible." Joint Appendix Ex. 14 at 33-34. Additionally, the Manual anticipated that a concierge could need to address criminal activity in common areas, stating: "In your position as concierge you may either become aware of, or be notified of, criminal activity. Just remember, when in doubt, report it." Id., at 8. Highbridge's duties also included unlocking Elevator 1 at 6:00 a.m. in the morning and locking it again at 4:00 p.m. Id., at 34-35. These functions related to building security because they were, at least in part, intended to prevent intruders from entering the Building through its common areas.

Highbridge understandably relies on the language of the Manual where it expressly states that "[Highbridge] is not an insurer of the building's security, safety or general exposures," Joint Appendix Ex. 14 at 6. I have considered this language in my reading of the entire contract. I am

unable to rule that this language defeats Plaintiffs' theory of contractual duty, for several reasons. First, Plaintiffs are not claiming Highbridge was their "insurer." Second, this disclaimer cannot negate the undisputed Record facts that Highbridge undertook certain functions under the Manual whose clear purpose was to prevent intruders from accessing the Building's common areas. And third, once these security-related functions were contractually undertaken by Highbridge, it had a duty to perform the functions with reasonable care, that is, in a non-negligent fashion.

The summary judgment Record contains several examples of performance by Highbridge personnel in key areas that a reasonable jury could determine to have been negligent: the failure of Raji to address Teixeira's loitering near the garage door when Raji drove his own car into the garage; the failure of Tongo and Raji to observe on the monitor that Teixeira was "piggybacking in" to the garage behind a different car; and the unexplained failure of Raji to notice packages and keys strewn about the 11th floor in front of the unit during his alleged building tour. The undisputed fact that Highbridge was not a security firm with employed security guards does not change this Record.

In his deposition, Mullen stated that, in his view, "the 24/7 concierge was a security and safety feature," and that he considered Highbridge's daily rounds of the building and monitoring of CCTV to be a security function. Joint Appendix Ex. 1 at 34, 177-178. The February 23, 2017 Board of Trustees meeting minutes indicate Highbridge had put an "increased focus on garage security (especially in cold weather when the doors act up)." Joint Appendix Ex. 52 at 5 (emphasis removed). While these facts may well be viewed by a reasonable jury to constitute an effort by the Trust to shift responsibility to its new concierge Highbridge, such Record evidence further supports the claim for summary judgment purposes that Highbridge assumed a duty

pursuant to the CSA to prevent foreseeable intruders from entering the common areas, and could lead a reasonable jury to determine Highbridge beached that duty.

Although I agree with Highbridge about the historical duty of a landowner to a guest, and respect that precedent, I believe it is distinguishable here as both a matter of fact and of law. Cf. Lev v. Beverly Enterprises-Massachusetts, 457 Mass. 234, 243 (2010); Luoni, 431 Mass. at 731-732; Velazquez v. Riverplace Apartments Limited Partnership, 79 Mass. App. Ct. 1103, (2011)(Rule 1:28 opinion)(definition of reasonable foreseeability based on policy and pragmatic judgment). For the reasons discussed above I am unpersuaded that our appellate courts will not impose a duty in this area of condominium living, in the context of this Record.

To the extent Highbridge contends Plaintiffs cannot establish Highbridge could reasonably have foreseen that its alleged acts or omissions would result in murder, I disagree. It was reasonably foreseeable that the negligent performance of Highbridge's access control obligations could result in an intruder gaining access to the Building, and committing a violent attack on a resident.[11] Surely one of the core reasons for "access control" to condominium buildings, whether through a concierge service or other means, is the prevention of criminal conduct against residents or their property.

Highbridge's motion for summary judgment on Counts IV and V (wrongful death) is accordingly DENIED.

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[11] For the same reason, I am not persuaded for purposes of summary judgment by Highbridge's arguments that Plaintiffs cannot establish proximate cause because the murders were a superseding-intervening event. Paper 38, at pages 16-19. Causation is a question of fact for the jury. Jupin, 447 Mass. at 147-148, n. 7 Fund v. Hotel Lenox of Boston, 418 Mass. 191 (1994)(court assumed, for summary judgment purposes, that hotel owed duty to guest, and ruled that stabbing murder by an intruder was reasonably foreseeable, given that security system could have been found to fail standard of reasonableness; summary judgment for defendant vacated); Ledet v. Mills Van Lines, Inc., 97 Mass. App. Ct. 667, 672, review denied, 486 Mass. 1104 (2020)("The concept of foreseeability defines both the limits of a duty of care and the limits of proximate causation."); Delaney v. Reynolds, 63 Mass. App. Ct. 239, 242 (2005)("Where the intervening occurrence was foreseeable by a defendant, the causal chain of events remains intact and the original negligence remains a proximate cause of a plaintiff's injury.").

Conclusion

For the reasons stated, the defendants' motions for summary judgment (Papers 38 and 41) are **ALLOWED as to Counts VI, IX, and XII, but otherwise DENIED**. The case shall go forward to trial by jury as scheduled against all three Defendants on all elements of the claims for the wrongful deaths of Dr. Field and Dr. Bolanos.

SO ORDERED.

Dated: July 5, 2022

Christine M. Roach

Appendix B

Sample Exculpatory Clause

SECURITY. THE ASSOCIATION MAY, BUT SHALL NOT BE REQUIRED TO, FROM TIME TO TIME, PROVIDE MEASURES OR TAKE ACTIONS THAT DIRECTLY OR INDIRECTLY IMPROVE THE SECURITY OF THE CONDOMINIUM; HOWEVER, EACH OWNER, FOR HIMSELF, HERSELF OR ITSELF, AND HIS, HER OR ITS TENANTS, OCCUPANTS, GUESTS, LICENSEES, AND INVITEES, ACKNOWLEDGES AND AGREES THAT THE ASSOCIATION IS NOT A PROVIDER OF SECURITY AND SHALL HAVE NO DUTY TO PROVIDE SECURITY ON OR AT THE CONDOMINIUM. THE GATE IS FOR VEHICULAR ACCESS CONTROL ONLY. THE ASSOCIATION DOES NOT GUARANTEE THAT NON- OWNERS AND NON-OCCUPANTS WILL NOT GAIN ACCESS TO THE CONDOMINIUM AND COMMIT CRIMINAL ACTS ON THE CONDOMINIUM NOR DOES THE ASSOCIATION GUARANTEE THAT CRIMINAL ACTS ON THE CONDOMINIUM WILL NOT BE COMMITTED BY OTHER OWNERS OR OCCUPANTS. IT SHALL BE THE RESPONSIBILITY OF EACH OWNER TO PROTECT HIS, HER OR ITS PERSON AND PROPERTY AND ALL RESPONSIBILITY TO PROVIDE SUCH SECURITY SHALL LIE SOLELY WITH EACH OWNER. THE ASSOCIATION SHALL NOT BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF ITS FAILURE TO PROVIDE ADEQUATE SECURITY OR THE INEFFECTIVENESS OF MEASURES UNDERTAKEN.

Exculpatory Clause in Bradford Square Condominium Ass'n, Inc. v. Miller

Security. The Association may, from time to time, provide measures of security on the condominium property; however, the Association is not a provider of security and shall have no duty to provide any security on the condominium property. The obligation to provide security lies solely with each unit owner individually. The Association shall not be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.

Appendix C

Scott B. Hayward, *Francis T. v. Village Green Owners Association: Liability of Condominium Association and Board of Directors for Criminal Acts of Third Persons*, 19 Pac.L.J. 377 (1988)

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McGeorge Law Review

Volume 19 | Issue 2 Article 7

1-1-1988

Frances T. v. Village Green Owners Association: Liability of Condominium Associations and Boards of Directors for Criminal Acts of Third Persons

Scott B. Hayward

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Frances T. v. Village Green Owners Association: Liability of Condominium Associations and Boards of Directors for Criminal Acts of Third Persons

In *Frances T. v. Village Green Owners Association*,[1] the owner of a condominium unit sued the condominium association[2] and the individual members of the board of directors of the association after being raped and robbed inside her own unit.[3] The plaintiff alleged negligence, breach of contract, and breach of fiduciary duty.[4] She contended that the failure of the association to install sufficient exterior lighting, and the refusal of the association to permit her to install additional lighting outside her unit was the cause of her injuries.[5] The California Supreme Court dismissed her causes of action for breach of fiduciary duty and breach of contract,[6] but remanded the negligence claim for trial.[7]

Part I of this note will discuss the legal background of *Frances T.*[8] Part II sets forth the facts and decision of the case. Part III will examine the legal ramifications of the opinion.

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1. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).
2. The condominium association was a non-profit corporation. *Id.* at 496, 723 P.2d at 574, 229 Cal. Rptr. at 457. Homeowners associations may be either incorporated or unincorporated. An incorporated homeowners association is incorporated and governed under the Nonprofit Mutual Benefit Corporation Law. *See* CAL. CORP. CODE §§ 7110-8910 (West 1977 & Supp. 1987). 11 D. HAGMAN & R. MAXWELL, CALIFORNIA REAL ESTATE LAW AND PRACTICE § 385.03 (1986) [hereinafter D. HAGMAN & R. MAXWELL].
3. *Frances T.*, 42 Cal. 3d at 495-96, 723 P.2d at 574, 229 Cal. Rptr. at 457.
4. *Id.*
5. *Id.* at 496-98, 723 P.2d at 574-76, 229 Cal. Rptr. 457-59.
6. The breach of the contract claim was dismissed on the grounds that the conditions, covenants, and restrictions, and the bylaws were incorporated in the contract, recorded in the grant deed for plaintiff's condominium, and no provisions were in the writing which imposed any contractual obligation on the defendants to install additional lighting. *Id.* at 512-13, 723 P.2d at 586-87, 229 Cal. Rptr. at 469. The breach of fiduciary duty claim was also dismissed. The court stated that the directors owe a fiduciary duty to the corporation to exercise due care and to maintain undivided loyalty to the corporation. A fiduciary duty does not normally arise between landlords and tenants, and the plaintiff alleged no facts showing the directors had a duty to serve as the Village Green Association's landlords. *Id.* at 513, 723 P.2d at 587, 229 Cal. Rptr. at 470.
7. *Id.* at 514, 723 P.2d at 587, 229 Cal. Rptr. at 470.
8. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

I. Legal Background

A. Landlord Liability

Under the early common law when a property owner leased to a tenant, the lessor surrendered both possession and control of the land to the lessee and merely retained a reversionary interest in the premises.[9] The lessee acquired a present possessory estate in the land during the term of the lease, with the attendant responsibilities of maintaining the premises and correcting dangerous conditions which developed while the tenant was in possession.[10] The landlord's responsibilities, therefore, were transferred to the lessee and the landlord had no duty to safeguard the physical security of tenants.[11]

Distinct exceptions to this general rule of nonliability have evolved when a "special relationship" exists.[12] These exceptions prompted the creation of a special relationship between landlords of urban

9. W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts 434 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984) [hereinafter Prosser & Keeton].

10. *Id.*

11. R. Schoshinski, American Law of Landlord and Tenant § 4:14 (1980). This rule continues in recent cases in some circumstances. *See* Powell v. United Oil Corp., 160 Ga. App. 810, 287 S.E.2d 667 (1982) (lessor of service station not liable for emotional distress of plaintiff when third person watched her using restroom facilities through peep hole); Seago v. Roy, 97 Ill. App. 3d 6, 424 N.E.2d 640 (1981) (even though landlords made minor repairs, landlords had no duty to keep safe premises under tenant's control); Moore v. Muntzel, 231 Kan. 46, 642 P.2d 957 (1982) (lessor retained no control over premises for determination of liability for fire damage).

12. R. Schoshinski, *supra* note 11, § 4:14. Certain relationships are protective by nature and give rise to an affirmative duty to render aid. *Id.* A "special relationship" exists between common carriers and passengers. *See, e.g.*, McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527 (5th Cir. 1967); Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959) (liability for physical attacks); Robinson v. Southern Ry. Co., 40 U.S. 549 (1913); Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921 (1898) (liability for thefts of property). The courts have also deemed the relationship between innkeepers and guests to be "special." *See, e.g.*, Fortney v. Hotel Rancroft, 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955); McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943); Jenness v. Sheraton-Cadillac Properties, Inc., 48 Mich. App. 723, 211 N.W.2d 106 (1973) (hotel guest was struck with tire iron by a woman the manager earlier suspected of loitering in the lobby to turn a trick). A special relationship is also present between employers and employees. *See, e.g.*, Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982); David v. Missouri P. Ry., 328 Mo. 437, 41 S.W.2d 179 (1931). The relationship between jailers and prisoners is also special. *See, e.g.*, Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Breaux v. State, 326 So. 2d 481 (La. 1976). Hospital-patient relationship is also considered special. *See, e.g.*, Sylvester v. Northwestern Hosp., 236 Minn. 384, 53 N.W.2d 17 (1952). The relationship is also "special" between schools and pupils. *See, e.g.*, Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975); Brahatcek v. Millard School Dist., 202 Neb. 86, 273 N.W.2d 680 (1979). A special relationship also exists between business establishments and customers. *See, e.g.*, Winn-Dixie Stores, Inc. v. Johnstoneaux, 395 S.2d 599 (Fla. App. 1981).

dwellings and their tenants.[13] The landlord-tenant exception departed from the early common law rule that the landlord was not required to take measures to protect the tenant from criminal acts of third persons absent the imposition of a duty by contract or statute.[14] The development of an exception to the common law rule was founded on the traditional innkeeper-guest exception under which a duty was imposed upon innkeepers to protect their guests.[15] The rationale of this rule was that patrons, and hence tenants, had limited ability to take measures for their own protection in situations where the landlord controlled the premises.[16] Since the conditions of modern day urban leasing bear little resemblance to the early common law setting, the law shifted to favor tenants with the right to expect protection from their landlords in certain situations.[17]

Perhaps the most problematic issue in those cases where a tenant has been injured by the criminal act of a third person is that of causation.[18] Both courts and commentators have debated whether to treat the landlord's failure to take protective measures as the proximate cause of the tenant's injury,[19] or to consider the third party's

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13. R. SCHOSHINSKI, *supra* note 11, at 216; PROSSER & KEETON, *supra* note 9, at 383. A special relationship did not arise in the agrarian setting of the early common law because the tenant was generally in total control of leased property and the ability of tenants to provide for their own protection was unimpaired. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299, 309 (1981).

14. R. SCHOSHINSKI, *supra* note 11, at 216. *See* Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962) (court followed traditional view and found no duty by landlord to protect others from criminal acts). The Restatement (Second) of Property section 17.3 is contrary to the traditional rule:

> A landlord who leases a part of his property and retains in his own control any other part the tenant is entitled to use as appurtenant to the part leased to him, is subject to liability to his tenant and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by a dangerous condition upon that part of the leased property retained in the landlord's control, if the landlord by the exercise of reasonable care could have: (1) discovered the condition and the unreasonable risk involved therein; and (2) made the condition safe.

RESTATEMENT (SECOND) OF PROPERTY § 17.3 (1952). Comment l to section 17.3 adds that the unreasonable risk of harm from criminal intrusion constitutes a dangerous condition. Furthermore, if the landlord could have discovered the unreasonable risk of criminal intrusion by the exercise of reasonable care, the landlord is subject to liability for physical harm caused by such intrusion if the landlord failed to take necessary precautions. *Id.* at Comment l.

15. R. SCHOSHINSKI, *supra* note 11, at 216.

16. *Id.*

17. *Id.* at 216-18.

18. Haines, *supra* note 13, at 309. *See Goldberg*, 38 N.J. at 590, 186 A.2d at 297 (the issue of causation is uncertain and nearly indeterminable because of the extraordinary speculation inherent in deterring criminal ventures of third persons).

19. Haines, *supra* note 13, at 310. *See* Sherman v. Concourse Realty Corp., 47 A.D. 2d 134, 139, 365 N.Y.S.2d 239, 244 (1975) (proximate cause represents a policy decision by which

intervening criminal act as a superseding cause.[20] The first divergence from the common law nonliability of landlords for third party criminal acts occurred in 1970 in the case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[21] which declared that a landlord has a duty to protect tenants from foreseeable criminal acts committed by third parties.[22] The court in *Kline* reasoned that a special

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it is determined how far removed an effect may be from its cause in fact for the actor to be held legally responsible).

20. Haines, *supra* note 13, at 310. *See* Applebaum v. Kidwell, 12 F.2d 846, 847 (D.C. Cir. 1926) (landlord not responsible for independent criminal acts of third parties); Kline v. 1500 Massachusetts Ave., 439 F.2d 477, 481 (1970) (an act of third person in committing intentional tort traditionally viewed as a superseding cause); Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 131, 695 P.2d 653, 662, 211 Cal. Rptr. 356, 365 (1985) (an injury due to the criminal acts of a third person was of no consequence in the determination of liability). Restatement (Second) of Torts section 448 provides that a third person's act in committing an intentional tort or crime is a superseding cause 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 use the opportunity to commit such a tort or crime. RESTATEMENT (SECOND) OF TORTS § 448 (1965). Restatement (Second) of Torts section 302B provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." *Id.* § 302B (1965). The Restatement (Second) of Torts section 449 states that if the likelihood that a third person may act in a particular manner is the hazard which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby. *Id.* § 449. Many courts have held that a third party criminal act severs the chain of causation between the landlord's failure to protect and the harm suffered by the tenant. Haines, *supra* note 13, at 310. *See, e.g.*, Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926) (criminal act is superseding cause); *Goldberg*, 38 N.J. at 590, 186 A.2d at 297 (1962) ("It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some or . . . additional policemen."). *But c.f.* Lillie v. Thompson, 332 U.S. 459 (1947) (foreseeable danger was irrelevant when employer knew of likelihood of danger of possible criminal attack and duty imposed on employer to take precautions against possible attack); Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962) (intervening forces will not break the causal connection if the intervention of the forces was itself probable or foreseeable). Despite the general "no duty" rule, landlords at common law were liable for third party criminal acts against their tenants if the landlords' direct act of negligence precipitated the injury. Haines, *supra* note 13, at 311. Landlords were responsible for misfeasance, or active misconduct causing injury to their tenants, but not for nonfeasance, or failure to take steps to protect the tenants from harm. Haines, *supra* note 15, at 311. The court in *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), stated that the reason earlier courts failed to impose a duty of protection on landlords was based upon several principles: (1) judicial reluctance to alter the traditional common law concept of the landlord-tenant relationship by broadening the responsibilities of the landlord; (2) the notion that the act of a third person in committing an intentional tort that harms another person is a superseding cause of the harm; (3) the difficulty of determining foreseeability of criminal acts; (4) the undefined standard which the landlord must meet; (5) the economic consequences of the imposition of the duty; and (6) the conflict between imposing a duty upon landlords to protect tenants and the public policy that allocates the duty of protecting citizens from criminal acts to the government rather than the private sector. *Kline*, 439 F.2d at 481.

21. 439 F.2d 477 (D.C. Cir. 1970).

22. *Id.* at 478. The court in *Kline* found support from *Levine v. Katz*, 407 F.2d 303

relationship exists between a landlord and a tenant giving rise to a duty.[23] The court stressed that the modern landlord-tenant relationship is more closely analogous to that of the innkeeper-guest relationship than to the agrarian antecedent where no duty was imposed, because modern tenants have little control over the common areas and can rarely provide for their own protection.[24] The tenant, therefore, has the right to expect the landlord to provide reasonable protection from foreseeable harm.[25]

The *Kline* decision has not precipitated the imposition upon landlords of a general duty to protect tenants from criminal activities. A limited duty arises only where the foreseeability of harm to tenants is present.[26] California courts have followed *Kline* in recognizing the landlord's liability in certain situations. For example, in *O'Hara v. Western Seven Trees Corp.*,[27] the landlords had been notified that a man had raped several tenants in their apartment complex.[28] The landlords were also aware of conditions indicating a likelihood that the rapist would repeat his attacks.[29] The plaintiff had been assured before leasing the premises that they were safe and were patrolled at all times by professional guards. The plaintiff, relying on these statements, rented the apartment and later found that the landlords did not employ any guards.[30] The tenant was raped in her apartment four months later.[31] The *O'Hara* court, relying upon *Kline*, stated that although the rape occurred in the tenant's apartment, the failure of the landlord to take reasonable precautions to safeguard the common areas could have contributed to the tenant's injuries and the case was remanded for trial.[32] *O'Hara* established the precedent that since only landlords are in a position to secure common areas, they have a duty to protect against types of crimes of which they

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(1968), which recognized that a landlord, who is the only party with the power to make repairs in a multiple dwelling complex, has a duty to tenants to use ordinary care and diligence to maintain the common areas in a safe condition. *Kline*, 439 F.2d at 480; Levine v. Katz, 407 F.2d 303, 304 (1968).

23. *Kline*, 439 F.2d at 482-83.
24. *Id.*
25. *Id.* The court in *Kline* stated that the value of the modern apartment lease includes not only the right to interior space, but also adequate heat, light, ventilation, serviceable plumbing, secure windows and doors, and proper maintenance. *Id.* at 481.
26. *Id. See* R. SCHOSHINSKI, *supra* note 11, at 217-23.
27. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).
28. *Id.* at 802, 142 Cal. Rptr. at 489.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 803, 142 Cal. Rptr. at 490.

have notice and which are likely to recur if the common areas are not secure.[33]

The rule of *O'Hara* was refined in *7735 Hollywood Boulevard Venture v. Superior Court*.[34] The plaintiff in *Hollywood* was raped by an individual who, because of his frequent attacks, had been dubbed the "Westside Rapist" by the media.[35] The plaintiff claimed that the landlord was negligent for failing to replace a burned out light bulb in the common area.[36] She alleged that because there were incidents of rape in the neighborhood, the landlord should have been on notice of the threat to her safety.[37] In dismissing the action, the court emphasized that there were no prior acts of violence *on the premises* and that the landlord could not therefore have had notice of the danger.[38] In addition to the court's finding that the landlord could not foresee the injury, the court found that requiring a landlord to install and maintain lighting for security purposes was problematic.[39] The court stated that imposing a duty raises the difficult problem of determining the areas in which lighting is required, and the wattage of lighting which the landlord has a duty to install.[40]

A short time after the *Hollywood* decision, the California Court of Appeal held in *Kwaitkowski v. Superior Trading Co.*[41] that a landlord owed a duty to guard the safety of his tenants.[42] The tenant in *Kwaitkowski* was raped and robbed in a dimly lit lobby of an apartment building. The front door to the complex had a defective lock and some lights were missing.[43] The factual situation in *Kwaitkowski* was similar to that in *Kline* and in *O'Hara* because the

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33. *Id.* at 803, 142 Cal. Rptr. at 490.
34. 116 Cal. App. 3d 901, 172 Cal. Rptr. 528 (1981).
35. *Id.* at 903, 172 Cal. Rptr. at 530.
36. *Id.*
37. *Id.*
38. *Id.* In defining the duty a landlord owes a tenant, the *Hollywood* court noted that even though a proprietor is not the insurer of the safety of persons on the premises, when foreseeable risks are present, the landlord is under a duty to control the acts of third persons and to protect the tenants against the risk of harm. Where the landlord has no reason to anticipate potential criminal attacks, however, the landlord is not required to take precautions against such unforeseeable injury. *Id.* at 905, 172 Cal. Rptr. at 530.
39. *Id.* at 906, 172 Cal. Rptr. at 530.
40. *Id.* at 905, 172 Cal. Rptr. 530. The *Hollywood* court stated that, where no prior crimes had occured on the premises, the question of duty owed is undefinable since "it is an easy matter to know whether a stairway is defective and what repairs will put it in order . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath, and the psychotic?" *Id.* (quoting Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962)).
41. 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).
42. *Id.*
43. *Id.* at 326, 176 Cal. Rptr. at 495.

landlords had actual notice of the danger to the tenants based on the high crime rate in the neighborhood, and prior attacks and robberies on the premises.[44] The court stressed that the difference between *Hollywood* and *Kwaitkowski* was that the assaults on other tenants were both predictable and probable in *Kwaitkowski*, whereas in *Hollywood* no prior attacks had occurred on the premises.[45] The *Kwaitkowski* court based the landlord's duty to the plaintiff on the special relationship between the landlord and the tenant[46] and the foreseeability of the criminal attack.[47] Thus, where the landlord has actual knowledge of prior attacks, a duty arises to protect the tenant from foreseeable harm by third persons.[48]

In 1984, the California Supreme Court extended landlord tort liability for the criminal acts of a third party to a community college in *Peterson v. San Francisco Community College District*.[49] The plaintiff in *Peterson* was assaulted on a stairway in a campus parking lot when a man jumped from behind thick foliage adjoining the stairway.[50] The court found that a special relationship existed which imposed a duty on the college to protect and warn the plaintiff against the dangers.[51] Since prior assaults of a similar nature had occurred on the same stairway and the defendant knew of the incidents, but failed to warn the tenant or trim the adjacent foliage, the defendant was liable.[52]

Landlord liability has also been extended to encompass homeowner's associations. In *White v. Cox*,[53] the Court of Appeals for the

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44. *Id.* at 333, 176 Cal. Rptr at 500.
45. *Id.*
46. *Id.* at 326, 176 Cal. Rptr. at 496. The landlord-tenant relationship is similar to that between an innkeeper and guest and is a "special relationship." *Id.*
47. *Id.*
48. *Id.*
49. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).
50. *Id.* at 805, 685 P.2d at 1195, 205 Cal. Rptr. at 844.
51. *Id.* at 806, 685 P.2d at 1195, 205 Cal. Rptr. at 844. As a general rule a person has no duty to control the conduct of another and no duty to warn others who may be endangered by such conduct. Commonly recognized special relations, however, impose a duty between innkeepers and guests and possessors of land and members of the public who enter in response to the landowner's invitation. *Id.*
52. *Id.* at 815, 685 P.2d at 1202, 205 Cal. Rptr. at 851. The failure of the defendant to notify students of prior assaults or to trim foliage connected the defendant's conduct with the plaintiff's injury. *Id.* The *Peterson* court defined the question of duty as:

> a shorthand statement of a conclusion, rather than an aid to analysis in itself .... But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.

Id. at 805-06, 685 P.2d at 1196, 205 Cal. Rptr. at 845 (quoting Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).
53. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).

Second District held that condominium owners could maintain an action against their condominium association for negligently maintaining a sprinkler in the common areas of the complex.[54] A member of the unincorporated association of condominium owners sued for personal injuries suffered when the plaintiff tripped and fell over a water sprinkler alleged to have been negligently maintained by the association in the common area of the project.[55] The court in *White* stated that condominiums draw elements both from tenancy in common and from separate ownership.[56] Condominium owners are therefore tenants in common of the common areas and the personal property held by the management association, and they are owners in fee of separate units.[57] The *White* court found that condominiums possess sufficient aspects of an unincorporated association to make them liable in tort to their members.[58] Therefore, the liability of a condominium association as a landlord had merely been extended to include the negligent maintenance of the common areas.[59]

B. Director Liability

The primary reason for the creation of a corporation is the limited liability afforded the shareholders for corporate obligations.[60] Tort liability of directors is rooted in the law of agency.[61] Directors are

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54. *Id.*
55. *Id.*
56. *Id.* at 829, 95 Cal. Rptr. at 262.
57. *Id.*
58. *Id.* at 830, 95 Cal. Rptr. at 263.
59. *Id.*
60. H. HENN & J. ALEXANDER, LAW OF CORPORATIONS 147 (3d ed. 1983) [hereinafter HENN & ALEXANDER]. Other corporate attributes include: (1) the power to take hold of and convey property in the corporate name; (2) the power to sue and to be sued in the coporate name; (3) centralization of management in the board of directors; (4) perpetual succession; and (5) ready transferability of interests. *Id.*
61. RESTATEMENT (SECOND) OF AGENCY §§ 352, 354 (1958). Section 352 provides:

> An agent is not liable for harm to a person other than his principal because of his failure adequately to perform his duties to his principal, physical harm results from reliance upon performance of the duties by the agent, or unless the agent has taken control of land or other tangible things.

Section 354 adds:

> An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize.

In regards to nonfeasance, Restatement (Second) of Agency section 354, comment b provides that "[t]he agent causes the damage by undertaking to afford protection and subsequently failing to give it." RESTATEMENT (SECOND) OF AGENCY § 354, Comment b (1958).

considered agents of their corporate principal for the purposes of tort liability.[62] Under both the early common law and the current law, directors are not liable for the torts of the corporation merely by virtue of their office.[63] Nevertheless, directors were liable for injuries suffered by third persons because of their own torts, irrespective of whether they acted on behalf of the corporation or on their own account.[64] Participation in the tort by the director may be found by direct action of the director[65] or by knowing approval or ratification of unlawful acts.[66] When directors personally direct or approve their agent's tortious conduct, they become jointly liable with the corporation and can be named personally as defendants.[67] The rationale for this rule, as stated in *O'Connell v. Union Drilling Co.*,[68] is that a contrary rule would allow a director of a corporation to escape liability by hiding behind the shield of his corporate position.[69]

In a later case, *United States Liability Insurance Co. v. Haidinger-Hayes, Inc.*,[70] the California Supreme Court reviewed an action brought by an insurance company against a corporation and the corporation's president for damages for negligence in computing the premium rate for an insured.[71] The court stated that directors or

62. HENN & ALEXANDER, *supra* note 60, at 583.

63. *See* O'Connell v. Union Drilling Co., 121 Cal. App. 302, 308-09, 8 P.2d 867, 870 (1932) (money paid by plaintiffs to corporation for securities which were void at inception held recoverable from directors who actively participated).

64. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (1975) (corporate director who voted for commission of tort is personally liable even though tortious act committed in name of corporation); Preston-Thomas Constr., Inc. v. Central Leasing Corp., 518 P.2d 1125 (Okla. App. 1974) (a corporate officer or director becomes personally liable for wrongfully using trust funds if the officer or director receives funds, participates in the wrongful distribution of funds or is ignorant of the wrongdoing and negligently fails to learn of the conversion).

65. *See* Price v. Hibbs, 225 Cal. App. 2d 209, 222, 37 Cal. Rptr. 270, 278, (1964) (corporate officials who act tortiously are liable to injured persons even though corporation may also be liable and have a cause of action against officials); James v. Marinship Corp., 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1944) (agent of corporation liable for his tortious act of discrimination in violation of contract).

66. *See, e.g.*, United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970) (liability insurance company brought action against corporation and corporation's president for negligence in computing premium rates for an insured).

67. *See* Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 841, 297 P. 2d 490, 493 (1956) (plaintiff injured by cable owned by corporation brought suit against corporation, director and officer who had notice of the danger but failed to remedy the danger).

68. 121 Cal. App. 302, 8 P.2d 867 (1932).

69. *Id.* at 309, 8 P.2d at 870. *See also* 18B AM. JUR. 2d *Corporations* § 1877 (1964).

70. 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970).

71. *Id.*

officers of a corporation only incur liability if they participate in the wrong or direct that the tort be done.[72] In examining the type of liability imposed upon agents for active participation in tortious acts, the court noted that liability of officers and directors has mostly been restricted to cases involving physical injury, not pecuniary harm, to third persons.[73] The court held the corporation liable, but not the corporation's president, because no fiduciary relationship existed between the president and the plaintiff.[74]

Directors have also been found liable in situations similar to that in *Dwyer v. Lanan & Snow Lumber Co.*[75] when the director knows that a condition or instrumentality under his or her control poses an unreasonable risk of injury to third parties, but fails to take action to remove the risk of harm.[76] In *Dwyer*, the manager of a sawmill informed the defendant, who was both the president and a director of the mill, that a cable had been secured improperly and was in danger of falling.[77] The cable had fallen once before. The corporate officials failed to secure the cable and were held liable to the person injured when the cable fell.[78] The court held that the director was liable for torts in which he had participated.[79]

In a later case, *Wyatt v. Union Mortgage Co.*,[80] the California Supreme Court applied the same rule of nonfeasance to misrepresentation by a lender of mortgage terms.[81] In *Wyatt*, the plaintiff was induced to enter into a loan agreement which had been advertized

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72. *Id.* at 595, 463 P.2d at 775, 83 Cal. Rptr. at 423 (1970). The court reasoned that directors are not responsible to third persons for negligence amounting to nonfeasance, nor are directors liable to third persons for a breach of duty owed to the corporation alone. *Id.* In order for directors to be liable there must be a breach of duty owed to the third person and the directors owed no duty to the plaintiff. *Id.*

73. *Haidinger-Hayes*, 1 Cal. 3d at 595, 463 P.2d at 775, 83 Cal. Rptr. at 423.

74. *Id.* at 594, 463 P.2d at 774, 83 Cal. Rptr. at 422.

75. 141 Cal. App. 2d 838, 297 P.2d 490 (1956).

76. *Id. See* Adams v. Fidelity and Casualty Co., 107 So. 2d 496 (La. App. 1958). In a wrongful death action when an iron reel fell on the deceased, the corporate directors were held liable because they should have foreseen the danger. *Id.* at 502. The court in *Adams* noted that imposing liability in cases of nonfeasance depends on whether the director owes a duty directly to a third person. No liability exists if the act consists only of a breach of duty which the director owes to the corporation. *Id. See also* Curlee v. Donaldson, 233 S.W.2d 746 (Mo. App. 1950) (officer who instructed corporation to trespass and cut timber is liable when act is done in the scope of employment); Schaefer v. D & J Produce Inc., 403 N.E.2d 1015 (Ohio App. 1978) (no liability of corporate officers when truck owned by corporation and driven by corporate agent struck and killed another motorist).

77. *Dwyer*, 141 Cal. App. 2d 838, 839, 297 P.2d 490, 491 (1956).

78. *Id.* at 841, 297 P.2d at 493.

79. *Id.*

80. 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979).

81. *Id.*

by the defendant as having a small balloon payment at the end of the loan term.[82] At the end of the term, the balloon payment was more than the original amount of the loan and the plaintiffs agreed to refinance the amount with the defendant.[83] The defendant then assessed late charges and eventually threatened to foreclose on the plaintiffs' home. The plaintiffs sued for misrepresentation of the loan terms in the mortgage agreement.[84] The court found that the defendant had misrepresented the terms of the loan and held that the directors were liable because they authorized and participated in a conspiracy to injure third parties through the corporate entity.[85]

The Ninth Circuit has also faced the issue of director liability for nonfeasance in *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*[86] In *Murphy*, the plaintiff sued the defendants under the Sherman Act[87] for effectively excluding their tugboats from servicing the large vessel segment of the ship assist market.[88] In dealing with the corporate executive's participation in attempting to monopolize the industry, the court stated that personal liability must be founded upon specific participation by the executive in the tort.[89] The participation necessary for liability to ensue may be in the form of direct action, or knowing approval or ratification of unlawful acts.[90] In addition, the court stressed that the acts or conduct must be inherently unlawful before liability will attach.[91] The court held

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82. *Id.* at 779-80, 598 P.2d at 48, 157 Cal. Rptr. at 395 (a balloon payment is amount owed to amortize principal and interest unpaid at maturity of loan when monthly payments are insufficient to cover full cost of loan).

83. *Id.*

84. *Id.* at 781, 598 P.2d at 49, 157 Cal. Rptr. at 396.

85. *Id.* at 785, 598 P.2d at 52, 157 Cal. Rptr. at 399.

86. 467 F. Supp. 841 (9th Cir. 1979).

87. The Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1987).

88. *Murphy*, 467 F. Supp. at 847.

89. *Id.* at 852.

90. *Id.* The court cited several cases to support this proposition. *See e.g.* Donesco, Inc. v. Casper Corp., 587 F.2d 602 (3rd Cir. 1978) (corporate officer arranged for the use and copying of material constituting unfair competition); Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (1975) (directors of the association promulgated and enforced white only membership policy).

91. *Murphy*, 467 F. Supp. 841, 852 (9th Cir. 1979). The court relied upon *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406 (10th Cir. 1958), which stressed that the act must be "positively wrongful" to generate individual liability to the participating directors or officers. *Lobato*, 261 F.2d at 409. The *Murphy* court further noted that this principle is codified in Section 2343 of the California Civil Code. *Murphy*, 467 F. Supp. at 852. California Civil Code section 2343 provides:

> AGENT'S RESPONSIBILITY TO THIRD PERSONS. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course

that the director's action, which was limited to approving or ratifying the policy of refusing to work with competitors, was not inherently wrongful and no liability could be imposed.[92]

California courts have consistently held directors liable for wrongful acts in which they participated or when they had knowledge of a dangerous condition but failed to take precautions.[93] As an agent of the corporation, directors are not liable for torts incurred by the acts of the corporation as a whole unless the director was an actor in the commission of the tort.[94]

II. The Case

The question presented in *Frances T. v. Village Green Owners Association*[95] was whether a condominium owners association and the individual members of the board of directors could be held liable for injuries to a resident caused by the criminal conduct of a third party.[96]

A. The Facts

The plaintiff owned and lived in a condominium unit located in a project consisting of ninety buildings with several large grassy areas called courts.[97] The owners association was responsible for the man-

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of his agency, in any of the following cases, and in no others:
1. When, with his consent, credit is given to him personally in a transaction; 2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or, 3. When his acts are wrongful in their nature.

CAL. CIV. CODE § 2343 (West 1985). However, the court stated that the often uncertain line between proper and improper conduct, and the social interest in not deterring socially useful conduct by the imposition of excessive risks makes appropriate a limitation on personal liability in cases of participation by directors in inherently wrongful conduct. *Murphy*, 467 F. Supp. at 853.

92. *Id.* at 853.

93. *See* Price v. Hibbs, 225 Cal. App. 2d 209, 222, 37 Cal. Rptr. 270, 278 (1964) (corporate officials who act tortiously are liable to injured persons even though corporation may also be liable); James v. Marinship Corp., 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1944) (agent of corporation liable for his tortious act of discrimination in violation of contract).

94. *See, e.g.*, Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F. Supp. 841 (9th Cir. 1979); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); James v. Marinship Corp., 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1944); Price v. Hibbs, 225 Cal. App. 2d 209, 222, 37 Cal. Rptr. 270, 278 (1964); Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 297 P.2d 490 (1956). *See also* 1B BALLANTINE & STERLING, CALIFORNIA CORPORATION LAWS (4th ed. 1985) § 101.

95. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

96. *Id.* at 495, 723 P.2d at 574, 229 Cal. Rptr. at 457.

97. *Id.* at 496, 723 P.2d at 575, 229 Cal. Rptr. at 458.

agement of the project and the maintenance of common areas.[98] The plaintiff's unit faced the largest court.[99] The project had been subject to a crime wave that included purse snatchings, burglaries, and robberies.[100] All of the residents, as well as the members of the board of directors, were aware of the criminal activity.[101] After the plaintiff's home was burglarized, she sought additional lighting because the court upon which her unit faced was dimly lit.[102] The plaintiff formally requested that the condominium board of directors install more lighting.[103] Some months later, when she had not heard from the board, she made a second request.[104] The board of directors failed to respond to the requests and the plaintiff subsequently installed additional exterior lighting herself.[105] The board of directors ordered her to remove the fixtures because the lighting violated the project's covenants, conditions and restrictions.[106] She refused to comply.[107] Subsequently, she appeared before the board and requested that her lights be allowed to remain until the lighting condition was improved.[108] The board ordered her to remove the lights and prohibited her from using them in the interim.[109] The plaintiff complied with the order and did not turn on her lights.[110] Since the lighting she had installed was connected with the original circuitry, and since she had removed the original lighting, the exterior of her unit was in total darkness.[111] The evening she turned off the offending light fixtures an intruder entered her unit and raped and robbed her.[112]

The plaintiff sued the condominium association and the directors for negligence, breach of contract, and breach of fiduciary duty.[113]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 498, 723 P.2d at 576, 229 Cal. Rptr. at 459. Section 11.2(b) of the Conditions, Covenants, and Restrictions provides: "Nothing shall be altered or constructed in or removed from the *Common Area* or the *Association Property*, except upon the written consent of the *Board*." *Id.* at 510 n.18, 723 P.2d at 584 n.18, 229 Cal. Rptr. at 467 n.18. (emphasis in original).
107. *Id.* at 498, 723 P.2d at 576, 229 Cal. Rptr. at 459.
108. *Id.*
109. *Id.* In response to complaints by residents, the board of directors, through the project's Architectural Guidelines Committee, began to investigate possible lighting improvements in early 1980. *Id.* at 497, 723 P.2d at 575, 229 Cal. Rptr. at 458.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 495, 723 P.2d at 574, 229 Cal. Rptr. at 457.

The trial court sustained defendant's demurrers to plaintiff's three causes of action without leave to amend and dismissed the case.[114] The Court of Appeal for the Second District affirmed the dismissal of the contract and breach of fiduciary duty claims, but held that the complaint stated a cause of action for negligence of the association and the directors.[115]

B. The Opinion

The California Supreme Court affirmed the appellate court decision allowing the plaintiff a cause of action for the negligence of the homeowners association and the directors.[116] The court relied on previous California decisions in concluding that the standard of care owed by the association to potential victims of third party criminal conduct is the same as that owed by a landlord.[117]

The *Frances T.* court cited *O'Hara v. Western Seven Trees Corp.*[118] which held a landlord has a duty to take reasonable steps to protect a tenant from the criminal acts of third parties.[119] The *Frances T.* court reasoned that since only landlords are in a position to secure the common areas, they have a duty to protect tenants against types of crimes of which the landlords have notice and which are likely to recur if the common areas are not secure.[120] The *Frances T.* court concluded that even though the association was not a landlord in the strict sense, the fact that the common areas were solely within the control of the association places the responsibilities of a landlord upon the association.[121] The court relied upon *White v. Cox*[122] to

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114. *Id.*

115. Frances Troy v. Village Green Condominium Project, 149 Cal. App. 3d 135, 196 Cal. Rptr. 680 (1983) (appellate decision).

116. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

117. Frances T. v. Village Green, 42 Cal. 3d at 499, 723 P.2d at 576, 229 Cal. Rptr. at 459 (1986).

118. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

119. *Frances T.*, 42 Cal. 3d at 501, 723 P.2d at 578, 229 Cal. Rptr. at 461. *See supra* notes 27-33 and accompanying text for discussion of *O'Hara*. The court in *Frances T.* also relied on *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 328, 176 Cal. Rptr. 494 (1981). *See supra* notes 41-48 for discussion of *Kwaitkowski*.

120. *Frances T.*, 42 Cal. 3d at 501, 723 P.2d at 578, 229 Cal. Rptr. at 461. The court in *Frances T.* noted that foreseeability is the most important factor to consider when analyzing the liability of the landlord. Foreseeability is determined in light of all the circumstances and not by a rigid mechanical rule. *Id.* at 502, 723 P.2d at 579, 229 Cal. Rptr. at 462. The *Frances T.* court also cited *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 695 P.2d 653, 24 Cal. Rptr. 356 (1985) (evidence of prior similar incidents is not an indispensible requisite or condition for a finding of foreseeability).

121. 42 Cal. 3d at 500, 723 P.2d at 578, 229 Cal. Rptr. at 461.

122. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).

hold the association liable for negligence since *White* held a condominium association to the same standard of care owed by landlords.[123]

The court emphasized that the association bears the duty to protect tenants from foreseeable crime.[124] The key to liability, according to the court, is whether the association had knowledge that prior crimes had been committed on the premises.[125] Even though the crimes which occurred before the plaintiff's injury did not include rape, the court stated that the precise injury to the plaintiff need not have been foreseen so long as the possibility of this type of harm was foreseeable.[126]

The *Frances T.* court then discussed the liability of the individual directors.[127] The court held that director liability for personal injuries to a third party depends on a finding that the director specifically authorized, directed, or participated in the allegedly tortious conduct, or that the director knew of the hazardous condition and negligently failed to take appropriate action to avoid the harm.[128] Under the circumstances of the case, the court found the plaintiff had alleged particularized facts that stated a cause of action for negligence against the individual directors.[129] The decision indicated that the directors may have acted reasonably and that the plaintiff must prove that an ordinary prudent person would not have acted similarly under the

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123. *Frances T.*, 42 Cal. 3d at 500, 723 P.2d at 577, 229 Cal. Rptr. at 459. The court also relied on *O'Connor v. Village Green Owners Association*, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983). In *O'Connor*, the issue was whether a condominium association that discriminated against children was a business establishment within the meaning of the Unruh Civil Rights Act (CAL. CIV. CODE § 51). *O'Connor*, 33 Cal. 3d at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324. The court in that case noted that the condominium association performs all the customary business functions which rest on the landlord in the traditional landlord-tenant relationship. *Id.*

124. *Id.*

125. *Id.* at 503, 723 P.2d at 579, 229 Cal. Rptr. at 462.

126. *Id.*

127. *Id.*

128. *Id.* at 508, 723 P.2d at 584-85, 229 Cal. Rptr. at 466-67. The *Frances T.* court cited several cases to support this proposition. *See* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975); Teledyne Indus., Inc. v. Eon Corp., 401 F. Supp. 729 (S.D.N.Y. 1975); Middlesex Ins. Co. v. Mann, 124 Cal. App. 3d 558, 177 Cal. Rptr. 495 (1981); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970); Price v. Hibbs, 225 Cal. App. 2d 209, 37 Cal. Rptr. 270 (1964); Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 841, 297 P.2d 490 (1956); Thomsen v. Culver City Motor Co., 4 Cal. App. 2d 639, 41 P.2d 597 (1935); O'Connell v. Union Drilling & Petroleum Co., 121 Cal. App. 302, 8 P.2d 867 (1932). The plaintiff must also prove that an ordinary prudent person would not have acted similarly under the circumstances. *Frances T.*, 42 Cal. 3d at 508, 723 P.2d at 584-85, 229 Cal. Rptr. at 466-67.

129. *Frances T.*, 42 Cal. 3d at 508, 723 P.2d at 584-85, 229 Cal. Rptr. at 466-67.

circumstances.[130] The court also noted that the causal link between the lighting and the plaintiff's injuries could have been too attenuated.[131] These questions, the court held, were for the trier of fact and were not appropriate grounds for sustaining a general demurrer to the plaintiff's claim.[132]

C. The Dissent

According to the dissent, neither the association nor the directors should have been liable for negligence.[133] One contention of the dissent is that the failure of the association to investigate the lighting was characterized wrongly by the majority as misfeasance.[134] Misfeasance, according to the dissent, denotes conduct which is blameworthy in itself and the failure of the association to act promptly was not blameworthy.[135] The dissenters also rejected the majority's finding that the association is under the same duty of care as a landlord to protect tenants from the criminal acts of third persons.[136] They objected to the majority's reliance on *O'Connor v. Village Green Owners Association*,[137] in which a homeowners association was construed to fill the role of a landlord under a statute which prevented discrimination in all business establishments.[138] The dissent proposed that the classification was irrelevant when deciding whether an association is similar to a landlord for the purposes of the general common law of torts.[139]

The dissent further contended that California Corporations Code Section 7231 was misconstrued by the majority and argued that the

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130. *Id.* at 511-12, 723 P.2d at 586, 229 Cal. Rptr. at 469.
131. *Id.*
132. *Id.*
133. *Id.* at 519, 723 P.2d at 591, 229 Cal. Rptr. at 474 (Mosk, J., dissenting).
134. *Id.*
135. *Id.* Chief Justice Bird, in her concurring opinion, found error in the dissent's reasoning. She contended the distinguishing factor between misfeasance and nonfeasance is dependant upon the participation of the defendant in the creation of the risk, not upon the blameworthiness of the defendant's conduct. *Id.* at 515, 723 P.2d at 588, 229 Cal. Rptr. at 695 (Bird, C.J. concurring). According to Chief Justice Bird, in order for an act to consitute misfeasance, the defendant's conduct need only increase the risk to the plaintiff and does not need to be blameworthy in itself. *Id.* at 515, 723 P.2d at 588, 229 Cal. Rptr. at 695. The formula for misfeasance and nonfeasance is capable of manipulation and any set of facts can be compressed within the concept of nonfeasance or expanded to fit the mold of misfeasance. Harper & Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886 (1934).
136. *Frances T.*, 42 Cal. 3d at 520, 723 P.2d at 592, 229 Cal. Rptr. at 475 (Mosk, J., dissenting).
137. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1981).
138. *Frances T.*, 42 Cal. 3d at 500, 723 P.2d at 577, 229 Cal. Rptr. at 460.
139. *Id.* at 520, 723 P.2d at 591, 229 Cal. Rptr. at 475 (Mosk, J., dissenting).

Code altered the common law.[140] The dissent argued that the California Legislature, in enacting Section 7231, changed the common law standard of care for directors by imposing one standard for all situations.[141] The proper standard, according to the dissent's interpretation of Section 7231, should be one of subjective reasonableness.[142] Therefore, the dissent would not apply the common law which holds a director liable for injuries to a third party when the corporation owes a duty of care to a third person.[143]

III. Legal Ramifications

The effect of the decision in *Frances T.* may be to deter qualified persons from becoming directors by subjecting them to increased liability in tort.[144] In the case of condominium associations, individuals are disinclined to serve as directors because of the increased exposure of their personal assets.[145] The added potential liability, as expanded by *Frances T.*, may further deter qualified individuals from serving since the risk is much greater than the rewards of being a director.[146]

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140. *Id.*

141. *Id.* at 526, 723 P.2d at 598, 229 Cal. Rptr. at 481.

142. *Id.* The California Corporations Code section 7231(a) outlines the duty of care a director owes to a corporation:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

California Corporations Code section 7231(c) adds:

> A person who performs the duties of a director in accordance with subdivision (a) . . . shall have no liability based upon an alleged failure to discharge the person's obligations as a director, including, without limiting, the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which assets held by a corporation are dedicated.

The California standard relies upon the ABA Committee's comments where the committee stated that the revised standard of care "reflects the good-faith concept embodied in the so-called 'business judgment rule,' which has been viewed by the courts as a fundamental precept for many decades . . . [and] incorporates the familiar concept that . . . a director should not be liable for an honest mistake of business judgment." ABA, *Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act,* 30 Bus. Law. 501, 505 (1975). *See also* 1B Ballantine & Sterling, California Corporation Laws (4th ed. 1985) § 406.01.

143. *Frances T.*, 42 Cal. 3d at 529, 723 P.2d at 598, 229 Cal. Rptr. at 481 (Mosk, J., dissenting).

144. J. Hanna, California Condominium Handbook 115 (1975).

145. 1B Ballantine & Sterling, *supra* note 142, at § 406.08.

146. *Frances T.*, 42 Cal. 3d at 529, 723 P.2d at 598, 229 Cal. Rptr. at 481 (Mosk, J., dissenting). *See also*, 1B Ballantine & Sterling, *supra* note 145, at § 406.08. Any person

The *Frances T.* decision may also cause increased insurance premiums that are necessary to cover the added exposure of directors. To assure directors that they may avoid the expense of liability in situations similar to that in *Frances T.*, corporations can indemnify or insure them for expenses and damages that may arise from being sued as a director.[147] With the parameters of liability increased by *Frances T.*, the costs of insurance for directors will proportionately rise to meet the additional tort exposure.[148] Many insurance companies have withdrawn from the directors and officers insurance market or have altered their policies to decrease the availability and scope of coverage, or have increased their premiums.[149] Since the condominium association finances its operations by levying assessments on the members, and because the cost of insurance is allowable as an operating expense,[150] the higher premiums will be passed on to the individual owners.[151] Even though members of nonprofit corporations

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considering serving as a director of a corporation is undoubtly concerned with potential personal liability. *Id.* Controlling law provides some reassurance that a director may avoid liability if the director performs the duties of a director and acts within the standards of conduct set forth in the Nonprofit Public Benefit Corporation Law or the Nonprofit Mutual Benefit Corporation Law. Both of these provisions require the director to perform his duties in good faith and to act as an ordinary prudent person would in a like position under similar circumstances. CAL. CORP. CODE §§ 5231(c), 7231(c) (West 1987). If a director acts according to this standard, then no liability should attach for any alleged failure to perform obligations as a director. 1B BALLANTINE & STERLING, *supra* note 142, at § 406.08. It is apparent the *Frances T.* decision invalidates the assurance of nonliability since the court found that the failure of the directors to act amounted to participation in the tortious activity, thus subjecting them to liability even though the directors were merely enforcing the Conditions, Covenants, and Restrictions of the association. *Frances T.*, 42 Cal. 3d at 511, 723 P.2d at 586, 229 Cal. Rptr. at 469.

147. 1B BALLANTINE & STERLING, *supra* note 142, at § 406.08. *See* CAL. CORP. CODE § 317 (West 1977) (corporations can indemnify agents against judgments, fines, settlements, and other amounts incurred in connection with a proceeding if the agent acted in good faith and in the best interests of the corporation). *See also id.* §§ 5238(a), 7237(a) (West 1987) (directors are agents entitled to indemnification if allowed by a majority vote of a quorum of directors or upon approval of the members).

148. Veasey, Finkelstein & Bigler, *Delaware Supports Directors With A Three Legged Stool of Limited Liability, Indemnification, and Insurance,* 42 BUS. LAW. 399, 400 (1987).

149. *Id.* Directors have reacted by refusing to serve because of increased potential liability. The creation of an unreasonable risk of exposure of director's personal assets is undermining the policy of having independent directors serve as decision makers. *Id.* at 401.

150. CAL. CIV. CODE § 1366(b)(1) (West 1987). The Department of Real Estate regulations provides that regular assessments to defray expenses attributable to operation of homeowners associations must ordinarily be levied against each owner according to the number of subdivision interests owned by the individual assessed to the total number of interests subject to easements. CAL. ADMIN. CODE tit. 10, § 2792.16(a) (1987). *See* D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.70.

151. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.70. Owners cannot escape the increase in expense because each unit owner is required to become a member of the homeowners association and to pay monthly assessments. *Id.* at § 386.04.

are not personally liable for the liabilities of the corporation,[152] if insurance is unavailable and if the association agrees to indemnify the director, the resulting expenses from lawsuits will be apportioned among the association members.[153]

Frances T. will also have an impact upon homeowners associations and their ability to enforce architectural controls.[154] Directors of homeowners associations are under a duty to exercise good faith in approving or restricting new construction or improvements, and stand in a fiduciary relationship with the association.[155] The court in *Frances T.* recognized that a fiduciary duty exists between the directors and the corporation,[156] and that homeowners may sue as shareholders for damages resulting to the corporation.[157] The architectural controls, which are included in the covenants and restrictions, are equitable servitudes and bind all owners of separate interests in the project.[158] These servitudes may be enforced by any owner of a separate interest as well as by the association.[159] Therefore, the homeowners may state a cause of action based upon a breach of the architectural controls against the association for approving construction which violates the covenants, conditions, and restrictions and an injunction may issue.[160] Damages may also be recovered for a violation of a covenant.[161] In

152. *Id.* at § 385.03.

153. *Id.* at § 385.70. Even though the board of directors is limited to regular assessment increases of no more than 10% of the regular assessment from the preceding year, and special assessments are limited to 5% of the budgeted gross receipts of the association for that year, the assessment limitation does not apply to the increases in the payments of insurance premiums. CAL. CIV. CODE § 1366(b) (West 1987).

154. *Frances T.*, 42 Cal. 3d at 529, 723 P.2d at 598, 299 Cal. Rptr. at 481.

155. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74. *See* Cohen v. Kite Hill Community Ass'n, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983) (homeowner stated a cause of action against association for approving the construction of a neighbor's fence in violation of the declaration of restrictions).

156. *Frances T.*, 42 Cal. 3d at 512, 723 P.2d at 587, 229 Cal. Rptr. at 470 (but no fiduciary duty exists between directors and shareholders).

157. *Id.* The *Frances T.* court found no fiduciary duty existed between the directors and the unit owner. *Id.*

158. CAL. CIV. CODE § 1354 (West 1987).

159. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74 (unless stated in the Covenants, Conditions, and Restrictions).

160. *Id. See* Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972) (injunction allowed for enforcement of a deed restriction limiting use to residential purposes in tract of single family homes); Arrowhead Mut. Serv. Co. v. Faust, 260 Cal. App. 2d 567, 67 Cal. Rptr. 325 (1968) (defendant's use of his lot for business purposes in violation of restrictions was enjoined by suit based on equitable servitudes brought by other lot owners); Bramwell v. Kuhle, 183 Cal. App. 2d 767, 6 Cal. Rptr. 839 (1960) (suit by owners of property to enjoin construction in violation of subdivision restrictions).

161. D. HAGMAN & R. MAXWELL, *supra* note 2, at § 385.74. *See* Knox v. Streatfield, 79 Cal. App. 3d 565, 145 Cal. Rptr. 39 (1978) (action brought by condominium owner against

light of these factors, the *Frances T.* decision places the directors in a Catch-22 situation. In the case, the directors complied with the association's covenants, conditions, and restrictions by mandating removal of the lighting since their presence was in direct violation of those regulations. The decision in *Frances T.*, however, places the directors in conflict with the association's guidelines since, by allowing the plaintiff's lights to remain, the directors would breach the fiduciary duty they owe to the corporation and could be subject to damages if a shareholder brought suit.[162]

IV. Conclusion

The California Supreme Court, in *Frances T. v. Village Green Owners Association*, has extended landlord liability in tort for the criminal acts of third parties to condominium homeowners associations. Not only did the court sustain a cause of action against the association, but the court also held that the directors of the association could be personally liable as well. The directors could be found to have participated in a tortious act by their failure to respond within a reasonable time to the plaintiff's request for adequate lighting. The *Frances T.* decision may give rise to increased exposure of directors for actions which actually amount to fulfillment of their duties to the corporation through the enforcement of the covenants, conditions, and restrictions of the homeowners association. The liability of an association and the directors appears to turn on whether the directors have knowledge of prior criminal acts on the premises and of faulty conditions which exist in the security of the premises. When such conditions exist, the directors are in a Catch-22 situation. If the directors remedy the condition, they may be breaching their fiduciary duties to the association by failing to enforce the association's building restrictions. On the other hand, adhering to their duty

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another owner for damages and injunctive relief for violations of subdivision building restrictions); Atlas Terminals, Inc. v. Sokol, 203 Cal. App. 2d 191, 21 Cal. Rptr. 293 (1962) (violation of restrictive covenant to keep property clean and sightly gives rise to damages).

162. D. Hagman & R. Maxwell, *supra* note 2, at § 385.74. *See* Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981) (homeowners acted as shareholders in suit for breach of fiduciary duty against developers who were directors of association and caused damage to the corporation); Knox v. Streatfield, 79 Cal. App. 3d 565, 145 Cal. Rptr. 39 (1978) (plaintiffs action for damages was based upon a reduction of property value for violations of the declaration of restrictions which amounted to the addition of a storage shed, painting portions of the common areas, construction of a deck and building a fence without approval of the architectural committee).

to follow the association building resitrictions could result in injuries to unit owners, which also results in liability.

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