

Are You Secure?

GARY S. KESSLER & ANTHONY BARBIERI



As a manager of property, there may come a time when you are faced with a situation where one of your tenant's

employees or invitees is harmed by the criminal act of a third party or another tenant's employee in the property. How do you determine whether your company or the owner of the property is liable for damages caused by this third party?

This issue has been one that has been winding its way through the Texas courts for some time. Originally, the holdings of the cases indicated that an owner or manager of commercial property was not liable for the criminal acts of a third party. There was a presumption that an owner could not anticipate when random criminal conduct might occur. It was thought, therefore, that if you provided security for a property that you actually increased the chances that you could be found liable based on an assumed duty that was not carried out completely. If you supplied security, it was thought that a claimant could allege that you supplied inadequate security and bring a case against the owner and manager for damages. As a result, many property managers and lawyers advised owners not to provide any security as part of the services that were to be provided and most likely to be passed on to the tenant in CAM.

Soon, however, a different trend of cases started to develop around the

country which imposed a duty on the owner of commercial property to protect against what was called foreseeable acts of the third parties. The Texas Supreme Court in a landmark case called *Timberwalk* outlined the following factors to determine the foreseeability of a criminal act on or near the premises that would give rise to a duty to protect against it: (1) whether criminal conduct previously occurred on or near the property; (2) how recently the prior criminal conduct occurred; (3) how often the prior criminal conduct occurred; (4) how similar the prior criminal conduct was to the conduct that occurred on the property; and (5) what publicity was given to the prior criminal conduct that would indicate that the landowner knew or should have known about the potential for crime. If a particular criminal attack by a third person is foreseeable, the court concluded that an

owner and manager would have a duty to exercise reasonable care to protect against the attack or warn against it. There are two tests that have been considered by the courts to determine whether an act was foreseeable: (i) the existence of prior similar incidents on or near the property or (ii) an analysis of the totality of the circumstances

involving the property and risks presented.

Under the narrower and more restrictive prior similar incidents test, the crime must have occurred on the premises or within the immediate area. The prior crime need not have been the same as the one that occurred but must have been similar so the particular danger was, or should have been known, to the manager or owner. The absence of any similar crimes or a very small number of crimes over a long period of time demonstrates that it was probably not foreseeable, and the converse suggests that it would be. Under the totality of the circumstances test, the courts will look at a larger area surrounding the premises and will expand the types of factors to include basically all

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information that was available to place the manager or owner on notice of the risk of harm. In the Timberwalk case, the court viewed a claim brought by a person lawfully on the premises as a result of injuries caused by a third party to be a “premises liability” claim. It held that these cases typically involve the alleged failure of owner or manager to employ adequate security measures. These security measures could be inadequate lighting, disconnected existing alarm systems, broken pin locks for sliding glass doors, inoperative security gates, an unrepaired opening in a security fence, the absence of guards for parking lots, or the absence of security cameras.

One of the risks in any case involving

security measures is the process by which the property manager secured bids for the security services. The worst thing that a manager can do is to accept bids that vary from a strictly defined bid proposal. Any plaintiff’s lawyer who has been “around the block” will ask for copies of all proposals made by any security company. If you purchased a less expensive program than one or more of the vendors had proposed, it will be a key document in the case and you will have to explain why the added “bells and whistles” were not part of the program, especially if they were of a type that would have made the criminal activity less likely. Hopefully, you will not have any of these problems, but it is always a good idea to know what is expected of you in this area of the law.

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